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IN THE

Supreme Court of the United States

October Term, 1966

No. [redacted] 1149

SANFORD E. ADAY, WALLACE DEORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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SANFORD E. ADAY, WALLACE DEORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on March 22, 1966, and amended on April 21, 1966.

Opinions Below.

The opinion of the Court of Appeals [R. 7], printed in Appendix A hereto, is unreported. The opinion of the District Court (Honorable Raymond W. Starr) (42a-62a)[1] is reported in 30 F.R.D.13. The opinions of the

[1]The reference "42a-62a" is to petitioners' Appendix Record on Appeal used in the court below and a part of the certified record filed with the petition herein. The said Appendix is in four volumes consecutively numbered, with the small "a" always appear-

District Court (Honorable Noel P. Fox) (97a-123a, 698a-760a) are reported in 216 F. Supp. 911 and 228 F. Supp. 171, respectively. The opinion of the Court of Appeals in mandamus proceedings prior to trial, printed in Appendix B hereto, is reported in 318 F. 2d 588, cert. den., 375 U.S. 832.

Jurisdiction.

The judgments of the Court of Appeals, printed in Appendices C, D, E and F hereto, were entered on March 22, 1966 [R. 3-6].[2] The order of the Court of Appeals authorizing the District Court to reduce the sentences imposed, printed in Appendix G hereto, was entered on April 5, 1966 [R. 8]. The order of the District Court amending the judgments of conviction and reducing sentences, printed in Appendix H hereto, was entered on April 6, 1966 [R. 9-11]. The order of the Court of Appeals approving the reductions of sentences and affirming the judgments of conviction, as amended, printed in Appendix I hereto, was entered on April 21, 1966.

By order of Mr. Justice Stewart, dated April 14, 1966, the time to file this petition for a writ of certiorari was extended to and including May 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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ing after the page number. Nine additional copies of the entire Appendix Record and the book herein involved, are also being filed for the convenience of the Court. Rule 21(4); 23(i).

[2]The District Court entered separate judgments of conviction for each of the petitioners (761a-763a, 764a-766a, and 767a). Petitioner Aday also prosecuted an appeal (13a) from an order of the District Court denying a motion for reduction of bail pending appeal (768a). The Court of Appeals entered four separate judgments of affirmance [R. 3-6].

Questions Presented.

The indictment returned against petitioners was one of the first to be brought under 18 U.S.C. 1461 and 1462, as amended in 1958 (August 28, 1958, Pub. L. 85-796, §§ 1, 12 Stat. 962), permitting multiple venue prosecutions and forum-picking by federal prosecutors. Pretrial motions, including motions for transfer of proceedings in the interest of justice, to dismiss the indictment, challenging the grand jury array, for a bill of particulars, all made pursuant to applicable provisions of the Federal Rules of Criminal Procedure, were denied, or dismissed for reasons which appear contrary to law and the Constitution.

The case was tried and submitted to the jury without proof of the essential ingredients of the offense. All comparison evidence offered by petitioners to demonstrate that the writing was not obscene and the absence of *scienter* on the part of petitioners was excluded by the trial court, upheld by the court below.

Not only does the uncontradicted record show that the book *Sex Life of a Cop* is entitled to constitutional protection, but in a constitutional sense the book is not obscene. The instructions of the trial court and the refusal to instruct appear to have misconceived and failed to apply the standards enunciated by this Court or judging issues of obscenity and *scienter*.

The mailing and shipment of a single book to establishments in the judicial district were held by the courts below to constitute separate offenses upon which maximum punishments could be inflicted. The jury verdict of guilty in Grand Rapids, Michigan with respect to the one book, *Sex Life of a Cop*, resulted in a sentence of

25 years' imprisonment for one petitioner, and 15 years' imprisonment for another petitioner, together with fines of $25,000 for one petitioner, $19,000 for another petitioner and $25,000 for a third petitioner. In total, the sentences imposed were 40 years' imprisonment and fines of $69,000. The immediate sequestration and restraints upon petitioners' business and funds and the cash bail of $85,000 for petitioners pending appeal are indicative of the atmosphere which permeated the courtroom in Grand Rapids.

The Court of Appeals, without passing upon the grave constitutional questions raised by the harsh punishments imposed upon petitioners, urged the District Judge to exercise a more "discreet" authority. It urged the District Court to put a top limit of 10 years upon the sentence of one petitioner, and something less for the other petitioner, while leaving the fines intact. The District Judge responded by leaving the fines of $69,000 intact, and imposing a sentence of 10 years' imprisonment upon one petitioner and 5 years' imprisonment upon the other, all of which was thereupon affirmed by the Court of Appeals.

The questions presented as a result of all the aforesaid are:

1. Whether, in the light of the provisions of the First, Fifth and Sixth Amendments, the instructions of the trial court, and the refusals to instruct, upheld by the Court of Appeals, rendered the federal obscenity statutes, 18 U.S.C. 1461 and 1462, as amended, unconstitutional, arbitrarily deprived petitioners of a fair trial and their liberties and property without due process of law, abridged petitioners' exercise of freedoms of

speech and press and vitiated the judgments of conviction, because:

(a) the trial court instructed the jury that the Government was required to prove only that each of the petitioners "knew the contents of the book";

(b) the trial court refused to instruct the jury that the Government was required to prove that each of the petitioners knew that the book was obscene;

(c) the trial court refused to instruct the jury that if the jury found that petitioners were honestly ignorant of the alleged obscenity of the book, then petitioners were entitled to an acquittal;

(d) the trial court refused to instruct the jury that the book could not be held to be obscene unless utterly without redeeming social importance, that the alleged pruriency of the book could not be balanced against the social importance of the material and that the presence of matters of social importance in the book gained for the book its position as constitutionally protected material;

(e) the trial court, without prior notice to petitioners, either in the indictment or throughout the trial, instructed the jury that the federal obscenity statutes authorized convictions of petitioners, either for the dissemination of a "filthy" book or the dissemination of an "obscene, lewd and lascivious" book, and defined the term "filthy" as that "sort of treatment of sexual matters in such a vulgar and revolting way that it tends to rouse a feeling of disgust and revulsion";

(f) the trial court arbitrarily and erroneously instructed the jury with respect to the meaning of

the words "obscene, lewd and lascivious", and instructed the jury in a manner similar to the *Hicklin* instructions, rejected by this Court as unconstitutionally restrictive; and

(g) the trial court refused to instruct the jury that the Government was required to prove that petitioners specifically intended to appeal to the prurient interest of the readers of the book; refused to give instructions requested by petitioners which were intended to limit the broad, ambiguous and conflicting instructions of the trial court, and arbitrarily refused to charge and disparaged petitioners' theory of the case, while stressing the Government's theory of the case.

2. Whether the judgments of conviction under the federal obscenity statutes and indictment herein, which rest on no evidence other than the book itself to establish the alleged obscenity of the writing or the alleged unlawful knowledge of petitioners, deprived these petitioners of a fair trial, of their liberties and property without due process of law and abridged petitioners' freedoms of speech and press contrary to the provisions of the First, Fifth and Sixth Amendments.

3. Whether the exclusion by the trial court, upheld by the Court of Appeals, of oral and documentary testimony offered by petitioners to establish the non-obscenity of the book and the absence of *scienter* on the part of petitioners, and the adverse rulings of the said courts with respect to constitutionally relevant comparison evidence and expert testimony offered by petitioners, deprived petitioners of a fair trial and their liberties and property without due process of law and abridged peti-

tioners' freedoms of speech and press, all contrary to the provisions of the First, Fifth and Sixth Amendments.

4. Whether the book *Sex Life of a Cop* by Oscar Peck is entitled to the protections of the free speech and press provisions of the First Amendment, and whether the federal obscenity statutes, 18 U.S.C. 1461 and 1462, as amended, as construed and applied to punish the mailing and shipment of the said book, render the statutes unconstitutional and arbitrarily deprive these petitioners of their liberties and property without due process of law and abridge petitioners' exercise of freedoms of speech and press, contrary to the provisions of the First and Fifth Amendments.

5. Whether the federal obscenity statutes, 18 U.S.C. 1461 and 1462, as amended by Congress in 1958, permitting the Government a multiple choice of venue in prosecutions involving the mailing and shipment of books and other media of communication, on their face and as construed and applied, violate the free speech and press, the due process and fair trial provisions of the First, Fifth and Sixth Amendments.

6. Whether the denial of petitioners' motion for a transfer of proceedings pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, upon the uncontradicted record herein which demonstrated an imperative requirement for change of venue in the interest of justice, deprived petitioners of a fair trial and their liberties and property without due process of law and abridged petitioners' exercise of freedoms of speech and press contrary to the provisions of the First, Fifth and Sixth Amendments.

7. Whether the refusal of the trial court to permit the book to be read in open court to the jury, upheld by the Court of Appeals, denied petitioners a public trial with resultant deprivation of petitioners' liberties and property without due process of law, a fair trial and the exercise of petitioners' freedoms of speech and press, all contrary to the provisions of the First, Fifth and Sixth Amendments.

8. Whether, contrary to the provisions of the Fifth and Sixth Amendments, the laws of the United States, 28 U.S.C. 1861-1871 and Rules 6 and 12 of the Federal Rules of Criminal Procedure, the trial court, upheld by the Court of Appeals, unlawfully struck petitioners' motion to dismiss the indictment based on the illegal selection and organization of the grand jury which returned the indictment, wrongfully abandoned the trial of the issues involved, and unlawfully refused to make an appropriate determination therein.

9. Whether the consecutive sentences of imprisonment and fines imposed upon petitioners by the trial court, upheld by the court below, thus permitting the multiplication of offenses and punishments for the dissemination of a single book, vitiates the judgments of conviction herein, arbitrarily deprive these petitioners of their liberties and property without due process of law and abridge the exercise of freedoms of speech and press, all contrary to the provisions of the First, Fifth and Sixth Amendments.

10. Whether the sentences of fines and imprisonment imposed upon these petitioners, the orders made after trial sequestering petitioners' property and the order requiring the furnishing of $75,000 cash bail pending appeal for petitioner Aday, constituted cruel and

unusual punishment and the imposition of excessive bail, as well as an inhibition upon the exercise of freedoms of speech and press, all contrary to law, the free speech and press provisions, the due process provisions and the cruel and unusual punishment and excessive bail provisions of the First, Fifth and Eighth Amendments.

Constitutional Provisions, Statutes, and Rules Involved.

The constitutional provisions involved are the First, Fifth, Sixth, Eighth, Ninth and Tenth Amendments; the statutory provisions involved are 18 U.S.C. 1461, as amended (June 25, 1948, c. 645, 62 Stat. 768; June 28, 1955, c. 190, §§1, 2, 69 Stat. 183; August 28, 1958, Pub. L. 85-796, §1, 72 Stat. 962), and 18 U.S.C. 1462, as amended (June 25, 1948, c. 645, 62 Stat. 768; May 27, 1950, c. 214, §1, 64 Stat. 194; August 28, 1958, Pub. L. 85-796, §2, 72 Stat. 962); and the pertinent provisions of Rules 6, 12 and 21(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., are printed in Appendix J hereto.

Statement of the Case.

A. The petitioners Aday and Maxey are long-time residents of the State of California (35a, 38a). The petitioner West Coast News Company, Inc. is a California corporation with its principal place of business in the City of Fresno, State of California (35a). The indictment herein (14a-27a) was returned against petitioners in Grand Rapids, Michigan in the United States District Court for the Western District of Michigan, Southern Division. The indictment was in 19 counts and charged petitioners with knowingly using the mails for delivery and with knowingly causing a common car-

rier to be used for carriage in interstate commerce from Fresno, California to establishments in the Western District of Michigan, Southern Division, certain named books alleged to be "obscene, lewd, lascivious and filthy" in violation of 18 U.S.C .1461 and 1462, as amended.

Although the indictment was in 19 counts, the books involved were only eight in number. The jury disagreed with respect to seven of the named books (592a), and agreement was reached only with respect to the book entitled *Sex Life of a Cop* (Counts 6, 10, 12, 13 and 14; 17a-18a, 20a, 21a-24a) upon which the judgments of conviction here are based. The five separate counts alleged the mailing and shipment of the book to retail establishments in the Western District of Michigan, Southern Division on specified days in August and September 1959.

Pursuant to the provisions of the Federal Rules of Criminal Procedure, Rule 21(b), petitioners moved for a transfer of the proceedings to the Southern District of California, Northern Division. The said motion was denied by the Honorable Raymond W. Starr, a Judge of the United States District Court for the Western District of Michigan, Southern Division (42a-62a). 30 F.R.D. 13.[3]

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[3]Following the decision of this Court in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, petitioners renewed their motion for transfer of proceedings (63a-74a) before the Honorable Noel P. Fox, a Judge of the said District Court, who became the trial judge herein following the retirement of Judge Starr. The motion was denied by Judge Fox, the said Judge stating that the "original holding" (116a) of Judge Starr would be adhered to (115a-123a). 216 F. Supp. at 923-927. A motion for leave to file a petition for writ of mandamus to review the orders denying transfer of proceedings was denied by this Court without opinion on June 17, 1963. *Aday, et al. v. United States District Court, etc.,* 374 U.S. 823.

Following arraignment, petitioners filed motions to dismiss the indictment upon the grounds, among others, that each of the counts of the indictment failed to state an offense; and that the statutes, as amended, on their face and as construed and applied by the indictment, violated the constitutional rights of petitioners (75a-81a). In addition, there was a challenge to the grand jury array (82a-83a). Petitioners also moved for a bill of particulars (86a-92a).

The aforesaid motion of the petitioners to dismiss the indictment upon constitutional and legal grounds (75a-81a) was denied by the District Court because "disposed of by Roth v. United States" (111a-112a). 216 F. Supp. at 921.

With respect to petitioners' motion challenging the grand jury array, the said District Judge granted a motion of the Government to strike petitioners' motion upon the ground that petitioners had impliedly and expressly waived any objections to the array by failing to make their motion prior to the return of the indictment (99a-112a).[4] Petitioners' motion for a bill of particulars was denied in its entirety (112a-115a). 216 F. Supp. at 921-923.

B. The trial commenced on October 28, 1963 (196a) and continued thereafter until December 13, 1963 when the jury verdict was returned (10a, 592a).

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[4]Mandamus proceedings were thereafter instituted by petitioners in the Court of Appeals, seeking to vacate the order which had stricken petitioners' motion to dismiss the indictment insofar as the motion challenged the method of selection of the grand jury. The Court of Appeals dismissed the petition for a writ of mandamus, declining to decide the questions involved "at this juncture of the proceedings". *Aday, et al. v. United States District Court, etc.*, 318 F. 2d 588, 591 (1963). A petition for a writ of certiorari was denied by this Court (375 U.S. 832).

With respect to the alleged obscenity of the book, the Government relied solely on the writing itself [Ex. 28; 250a]. No testimony, oral or documentary, was offered on the Government's direct case to prove that the book substantially exceeded customary limits of candor in the description or depiction of sex, or appealed to prurient interest, or was utterly without social importance (230a-235a, 550a-551a); nor following the conclusion of petitioners' case did the Government offer any rebuttal testimony on this issue (533a).

The Government made no attempt to prove, and indeed specifically disclaimed any legal burden requiring it to prove, knowledge by petitioners that the book was obscene (234a).

Petitioners moved that the books be read to the jury in open court. The trial court initially ruled in favor of petitioners (201a, 224a-225a), but subsequently reconsidered its position (262a-273a). See also, 703a-713a; 228 F. Supp. 171, 175-179.

Petitioners, on their own behalf, sought to establish that the books, including the book involved herein, did not violate the federal statutes as charged in the indictment, that the said books were constitutionally protected, and that petitioners had no knowledge that the said books were obscene, lewd, indecent or filthy. To prove the absence of *scienter* and nonobscenity of the writings, petitioners offered oral and documentary testimony, a large portion of which was excluded by the trial court. Some of the trial court's rulings in the exclusion of evidence offered by petitioners may be found in the written opinion of the trial court (698a-760a, 713a-760a); 228 F. Supp. 171, 179-203.

The trial court turned aside every attempt by petitioners to introduce comparison evidence bearing on community standards (735a-744a). 228 F. Supp. 191-195. As a result of the rulings of the trial court, the testimony of various witnesses and documentary evidence offered by petitioners, as well as various offers of proof with respect thereto, were all excluded and rejected by the trial court (400a-410a, 414a-432a, 468a, 470a-472a, 474a, 477a-478a, 481a-483a, 494a, 608a-639a).

The trial court also promulgated restrictive rules with respect to the use of expert witnesses by petitioners (718a-735a). 228 F. Supp. at 182-191. The trial court held that no expert could mention to the jury the name of any other book in his testimony except the books named in the indictment (735a; 228 F. Supp. at 190-191), and throughout the trial, including summation to the jury, all witnesses and counsel were directed by the trial court not to mention the title of a single book, not even the names of publishers, except the challenged books. Offers of proof were required to be in writing or outside the presence of the jury, and testimony by petitioners' witnesses with respect to the comparability of various books with the named books, and their *voir dire* examinations on qualifications, were also required to be held out of the presence of the jury (237a-239a, 241a, 251a-259a, 261a-262a, 273a-280a, 282a-288a, 308a, 311a-312a, 325a-339a, 346a, 358a-396a, 398a, 400a-411a, 443a, 466a-467a, 469a-474a, 506a-523a, 541a-542a, 608a-639a).

Much of the aforesaid evidence which was excluded and rejected by the trial court was also offered to prove lack of any unlawful knowledge or intent on the part of

petitioners. Other attempts by cross-examination of the prosecution's witnesses, or by petitioners on their own case to prove absence of *scienter* were rejected (275a-276a, 282a-287a, 400a-409a, 416a-429a, 469a-473a, 477a-478a, 494a, 608a-639a).

Petitioners moved for judgments of acquittal at the close of the Government's case (287a-288a, 685a-689a). These motions for judgments of acquittal were renewed at the close of petitioners' case, and again renewed at the conclusion of the entire case, the Government having rested its case without rebuttal (532a-534a). All of the aforesaid motions were denied by the trial court.

C. The instructions of the trial court to the jury (542a-564a, 573a-592a), the objections to the trial court's instructions by petitioners (564a-573a, 577a-583a, 589a), petitioners' proposed instructions which were rejected (640a-669a), and the argument on requested instructions (483a-492a, 534a-540a) reflect the trial court's conception of the governing law and the applicability of the said law to petitioners.

1. The trial court instructed the jury that the burden was on the Government to prove that each of the petitioners "knew the contents of the book" (555a-556a). Petitioners requested the trial court to instruct the jury that the proof must show "that each of the defendants knew that the books here involved were obscene" (640a-641a, P.I. 9, 14[5]). The trial court was requested to instruct the jury that mere knowledge of the contents of a book "does not for that reason alone justify an inference that the defendants knew the books were obscene" (641a, P.I. 15; 642a, P.I. 20).

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[5]The reference "P.I." refers to petitioners' Proposed Instructions.

Petitioners also requested the trial court to instruct the jury as follows: "If you believe that the defendants were honestly ignorant of the 'obscenity' of the books, if you should find they were 'obscene', then the defendants should be acquitted" (642a, P.I. 19).

Petitioners also requested the trial court to instruct the jury that the offense proscribed by the statutes required proof of a "specific intent" to appeal to the prurient interest (641a, P.I. 12); that in every crime, "there must exist a union or joint operation of act and intent" (642a, P.I. 17); and that a "specific intent to appeal to prurient interest" cannot be inferred merely from discussion of sex, or merely from the act of editing writing or mailing of a book (641a, P.I. 13; 643a, P.I. 21). The trial court refused to give the aforesaid instructions (485a-486a), rejecting as a "fallacy" petitioners' claims with respect to the burden placed upon the Government to prove knowledge of obscenity, and petitioners' right to acquittal if the jury found that petitioners honestly were ignorant of the obscenity of the writing as alleged in the indictment (486a).[6]

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[6]Petitioners objected to the trial court's instructions on knowledge as follows:

> "On the area of knowledge in both regards, the defendants respectfully object to the charge given by the Court, first of all, the Court has instructed the jury that knowledge of content is sufficient under the law and has refused the defendants' instructions which have in effect said that if the defendants in good faith, believe the material not to be obscene, that is a defense. We believe that the law requires knowledge on the part of the defendants that the material is in fact obscene and therefore, we respectfully object to the Court's giving the instruction and object to the refusal of the Court to give the defendants' instructions on knowledge as set forth in the defendants' proposed instructions." (569a-570a).

2. Petitioners requested the trial court to instruct the jury as follows:

> "A writing may not be deemed obscene unless it is utterly without redeeming social importance. In other words, the Constitution protects all material relating to sex except that which is totally devoid of social importance. The word 'redeeming' in the context herein refers not to a balancing of the alleged pruriency against the social importance of the material, but rather to the presence of matters of social importance in the content which gains for the material its position as constitutionally protected utterance. The jury will therefore keep in mind that in addition to the standards for judging obscenity, heretofore defined, no writing can be found to be obscene unless the writing is also utterly without redeeming social importance as the Court has defined it. *Zeitlin v. Arnebergh,* 31 Cal. Rptr. 800." (664a, P.I. 103).

With respect to this crucial instruction, the trial court not only denied the request, but termed it "an incorrect statement of the law as to elements of the offense which is covered" (535a). The trial court looked upon this statement of the law as peculiar to California because of the legislation in that State, but the trial court insisted that the issue of social importance, or the fact that social importance could not be weighed against prurient interest, was "not an element of the definition itself" (535a).

3. The trial court also instructed the jury as follows:

> "What is meant by 'obscene, lewd, lascivious or filthy'?

"On this element of the charged crimes, *there are two concepts in the statute,* the first relates to the words 'obscene, lewd and lascivious'. . . .

* * *

" 'Filthy' as used here, must also relate to sexual matters. *It is distinguished from the term 'obscene'.* 'Filthy' pertains to that sort of treatment of sexual matters in such a vulgar and revolting way that it tends to rouse a feeling of disgust and revulsion." (557a-562a; emphasis added).

In this connection, it should be noted that as soon as the indictment was returned, petitioners moved the trial court for a bill of particulars (86a-92a) requesting, among other things, a statement as to whether the terms "obscene, lewd, lascivious, indecent and filthy", as alleged in the indictment, were intended to encompass "a single concept, to wit, 'obscenity', or whether each of the said words is intended to encompass different concepts" (87a). The Government opposed the request upon the ground that the Government was not required to state initially "its theory of this case" (93a). Petitioners' motion for a bill of particulars was denied *in toto* (95a-96a, 112a-115a).

At the very outset of the trial, counsel for petitioners submitted to the trial court that during the selection of the jury, the trial court had twice read the entire statute and that the jury might be misled since the only charge was that the books were "obscene" and that the use of terms like "filthy, lewd and lascivious" might tend to broaden the meaning of the charge in the indictment as far as the jury was concerned (223a-224a). The trial court stated that it would prepare an instruction for the

jury "before the books are read" (227½a). The Government's counsel inquired what would be the subject matter of the instructions. The trial court replied: "A definition of obscenity, as nearly precise as we can get a definition so they will know what they are looking for" (227½a). The Government declined to elect "as to whether they are going on obscenity or something more than obscenity" (228a). The Government pointed out that some counts of the indictment used the words "obscene, lewd and indecent"; other counts used "obscene, lewd, lascivious and filthy" (229a). Stated the Government: "It appears as though we are talking about a difference without a distinction" (229a). Counsel for petitioners stated:

> "All right, let me say this, that as I sit here now, I assume that all we have to defend against is the term 'obscene' " (229a).

The Government never thereafter specifically requested an instruction on "filthy". The trial court never advised petitioners as to what instructions it intended to give with respect to the term "filthy", nor did it advise petitioners that "filthy" would be defined as a term distinguished from "obscenity", or that the word "filthy", so distinguished from "obscenity", would be defined in terms of a tendency to rouse feelings of disgust and revulsion.[7]

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[7]After the instruction was given, the following objection was made by counsel for petitioners:

> "MR. FLEISHMAN: If the Court please, the defendants object to the instructions just given to the jury, first and perhaps foremost, the defendants object to giving the instruction on the term 'filthy'. This was not tendered by the Government, it was a matter that remained open from the first day of the trial. As I recall and as I had understood it, the term 'filthy' was not an issue in this case and for the

4. With respect to the meaning of the words "obscene, lewd and lascivious" as contained in the statutes, the trial court defined the terms, among other things, as "signifying that form of immorality as it relates to sexual and prurient, and has a tendency to arouse lustful thoughts"; tending "to arouse sexual impulses and lead to sexually impure thoughts"; the arousal of "sexual desires" (557a). The trial court instructed the jury that "the line dividing the salacious from literature, art, science, and legitimate entertainment or amusement, is not straight and unwavering"; that "contemporary community standards" means "the standards generally held throughout this country covering sex and matters pertaining to sex"; means "the average conscience of the time"; means "the present critical point in the compromise between candor and shame at which the community may have arrived here and now"; means "the common conscience of the community according to present day standards" [560a-561a). The trial court further instructed the jury that in determining the "common conscience", the jury was "to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children; the community north, south, east and west, the large and the small, the very strict and the very liberal" (561a). "Prurient" was defined as meaning "itching, longing, uneasy with desires and longing, of persons having itching, morbid or lascivious longing of desire, morbidity or propensities, lewd" (562a).

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first time, it has been included into this case without any warning to the defendants and without any request having been made by the Government for such a request and therefore, respectfully object to that instruction." (564a-565a; and see, 572a-573a).

The jury returned a number of times to the court room for further inquiries. On one occasion, it asked that the sections of the statutes be read (566a-577a). The next time the jury returned, it asked for the *Roth* decision. The trial court stated it could not give the jury the *Roth* case, but instead read to them "the test" (577a). The Court then added the following to the jury: "The court's interpretation or determination of obscenity in that respect, I direct your attention to my entire charge." (577a). After colloquy with counsel, the court then read what purported to be the entire instruction on obscenity (578a-580a), omitting over objection by counsel for petitioners the statement in the instructions that a thing is obscene only if it goes substantially beyond customary limits of candor in description or representation of sex (580a-581a, 560a).[8]

D. The jurors returned a verdict solely on the book herein involved; as heretofore stated there was disagreement on all the other books. The verdict of guilt was therefore only with respect to Counts 6, 10, 12, 13 and 14 of the indictment (592a).

Upon the return of the verdict, the bail of the individual petitioners was revoked and they were remanded to the county jail (593a-601a). At the request of the Government (593a-601a), the trial court also entered an

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[8]All attempts by petitioners to persuade the trial court to define the standards for judging obscenity within constitutional limits were rejected (644a, P.I. 25; 648a, P.I. 39; 649a, P.I. 40; 655a, P.I. 66; 656a, P.I. 68; 657a, P.I. 70, 657a, P.I. 73, 658a, P.I. 74; 660a, P.I. 100; 662a, P.I. 101; 667a, P.I. 120, 669a, P.I. 125). All efforts on the part of petitioners to have the jury instructed on their theories of defense were also rejected. Petitioners amplify this point and other infirmities in the trial court's instructions and refusals to instruct in the discussion which follows under the Reasons for Granting the Writ.

order restraining the corporate petitioner from making any transfer or disbursement of its assets, except necessary disbursements to enable the corporation to carry on its day-to-day business until a final judgment was entered "and satisfied" in the action. The order also restrained the individual petitioners from making any transfer or disbursement of their assets, except as necessary for living expenses, until such time as a final judgment was similarly entered and satisfied. It was also provided that if petitioners sought to pay attorneys' fees or costs, "they may do so by petition to this Court for the release of such funds" (769a-770a).

Motions for a new trial (690a-693a) and in arrest of judgment (694a-697a) filed on behalf of petitioners were denied by the trial court (601a-602a).

The sentence of the trial court on December 30, 1963 as to petitioner Aday was 5 years' imprisonment on each count, the sentences to run consecutively, or a total of 25 years' imprisonment and a fine of $5,000 on each count, or a total sum of $25,000.

As to petitioner Maxey, the sentence was 5 years on Counts 6 and 10, 2 years' imprisonment on Counts 12 and 13, and 1 year imprisonment on Count 14, the sentences to run consecutively, or a total of 15 years' imprisonment, and a fine of $5,000. on Counts 6 and 10, a fine of $2,000 on Counts 12 and 13, and a fine of $5,000 on Count 14, or a total sum of $19,000.

The corporate defendant was fined the sum of $5,000 on each count, or a total sum of $25,000 (602a-606a).

Judgments of conviction were entered on February 27 1964 (761a-767a). Bail pending appeal was fixed at $75,000 cash for petitioner Aday and $10,000 cash for

petitioner Maxey (606-607a). A motion for reduction of bail on behalf of petitioner Aday was denied (607a, 768a). Bail was thereafter furnished by petitioners, and the appeals to the Court of Appeals followed (12a-13a).

E. The opinion of the Court of Appeals (Appendix A) was rendered on March 22, 1966.

With respect to the instructions of the District Judge, the Court of Appeals held that the trial court had properly instructed the jury that the only burden upon the Government was to prove the contents of the book. The Court of Appeals held that there was no burden upon the Government to prove that the individual petitioners knew that the contents were in fact obscene, and that the trial court had properly refused to charge that honest ignorance of the obscenity of the book was a defense (Appendix A, pp. 12-14).

With respect to other specific claimed errors in the instructions of the trial court and the refusal of the trial court to instruct, the Court of Appeals gave no answers, except to state that the Court would not "attempt detailed discussion of the District Judge's charge to the jury. Suffice it to say that his instructions followed the guidelines of *Roth* and *Jacobellis* and adequately presented the applicable rules of law" (App. A, p. 14).

With respect to petitioners' claims regarding the rulings of the trial court on the exclusion of proffered testimony, oral and documentary, by petitioners, the court below concluded that the rulings of the trial judge were legally proper (Appendix A, pp. 5-10).

The Court concluded that the book involved was obscene, and "that no amount of sophisticated dialectics

could absolve it from classification as 'hard core' " (Appendix A, pp. 1-2). The Court stated that it did not believe that the guarantees of the First Amendment could be "elasticized to embrace *Sex Life of a Cop*" (Appendix A, p. 4), and that "the wise and timesaving succinctness employed by Mr. Justice Potter Stewart in *Jacobellis*" justified the Court in holding that "we know hard core pornography when we see it, and *Sex Life of a Cop* is just that" (Appendix A, p. 5).

With respect to petitioners' claims that the 1958 Amendments to 18 U.S.C. 1461 and 1462 rendered the statutes unconstitutional, the Court of Appeals held that no constitutional fault could be found in the said statutes. With respect to petitioners' contention that the trial court had erred in denying petitioners' motion for transfer of proceedings, the Court of Appeals concluded that petitioners were not deprived of a fair trial as a result of the denial of the motion (Appendix A, pp. 10-12).

The Court of Appeals held that the failure to read the book to the jury did not deprive petitioners of any constitutional right (Appendix A, p. 12), and that petitioners' challenge to the grand jury array was properly dimissed (Appendix A, pp. 14-15).

In only one aspect of the case did the court below appear to feel some misgivings. The Court of Appeals expressed the view "that less severe sentences would have been a more discreet exercise of the District Judge's authority" (Appendix A, p. 17). The Court opined that each of the petitioners may have already "'exhausted his balance with fate'" (App. A. p. 19), but urged the District Judge to so amend the judgments of conviction that petitioner Aday would not receive a

greater prison sentence then 10 years and the petitioner Maxey a sentence "something less than that imposed upon Aday" (App. A, p. 20). The Court added: "We suggest no change in the fines imposed. It is a fair inference that the book business we deal with can well afford them" (App. A, p. 20).

The judgments of conviction were thereupon affirmed, with remand of the cause to the District Court for its reconsideration of the prison sentences in the light of the opinion (App. A, p. 21). As heretofore stated, upon remand, the District Court amended the judgments of conviction to impose a sentence of 10 years' imprisonment upon petitioner Aday and a sentence of 5 years' imprisonment upon petitioner Maxey (App. H, pp. 34-36), and thereupon the Court of Appeals, approving the reductions of sentences, amended the judgments in this cause and affirmed (App. I, pp. 37-38).

Reasons for Granting the Writ.

1(a) The Court of Appeals, upholding the rulings and instructions of the trial court, has held that the federal obscenity statutes require proof only that an accused knew the contents of the alleged obscenity; that the Government has no burden to prove that an individual accused knew that the contents of the book were in fact obscene; and that in a prosecution under the federal obscenity statutes, an accused is not entitled to an acquittal, even if the jury finds that the accused was honestly ignorant of the alleged obscenity of the writing.

The question presented on this facet of the case is of constitutional importance.[9] In *Mishkin v. New York*,

[9]Similar issues with respect to questions of *scienter* are presented in *Redrup v. New York*, October Term, 1965, No. 72, cer-

86 S. Ct. 958, 964, and footnotes 5, 9, this Court construed the state obscenity statute as establishing standards for determining "the vital element of scienter" more stringent than mere knowledge of the contents of a writing. This Court held that proof of guilty knowledge was required in obscenity prosecutions in order "to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity" (86 S. Ct. at 965).

The elimination of a requirement of guilty knowledge in federal obscenity prosecutions would render 18 U.S.C. 1461 and 1462, as amended, vague, ambiguous and violative of the free speech and press and due process provisions of the First and Fifth Amendments. The statutes are only intended to punish those who disseminate books or other writings which substantially exceed customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; and whose dominant theme, taken as a whole, appeal to the prurient interest of the average person; and are utterly without social importance. A statute which indiscriminatorily punishes those who have no knowledge of these unlawful elements of the offense sweeps within its ambit protected speech and expression, and subjects persons to fine and imprisonment for violation of an offense which provides no ascertainable standards of guilt. *Thornhill v. Alabama,* 310 U.S. 88; *United States v. L. Cohen Grocery Co.,* 255 U.S. 81; *Garrison v. Louisiana,* 379

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tiorari granted April 25, 1966 (34 U.S. Law Week. 3363); and *Austin v. Kentucky,* October Term, 1965, No. 453, certiorari granted April 25, 1966 (34 U.S. Law Week. 3363).

U.S. 64; *Giaccio v. Pennsylvania*, 382 U.S. 399; *Dombrowski, et al. v. Pfister*, 380 U.S. 479.

The self-censorship compelled by the statutes as thus construed could well deprive the public of access to constitutionally protected material. The absence of *scienter* in the statutory proscription compels publishers, distributors and booksellers to become public censors. It places upon them the burden of separating the obscene from the nonobscene. This indeed would be a "virulent" censorship condemned by both law and history. *Smith v. California*, 361 U.S. 147; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478.[10]

The holding of the courts below, in addition, that honest ignorance of the obscene nature of a writing is not a defense in a federal obscenity prosecution creates similar constitutional infirmities in 18 U.S.C. 1461 and 1462. See, Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 103-108 (1960); A.L.I. Model Penal Code (Tent. Draft No. 6, 1957), 51; Note, The Supreme Court 1959 Term, 74 Harv. L. Rev. 81, 126-128 (1960). See also, Mueller, On Common Law Mens Rea, 42 Minn. L. Rev. 1043, 1072-1073 (1958).

A statute which deprives an accused in an obscenity prosecution of a defense of good-faith belief that the

[10]State courts have required the prosecution to plead and prove that the accused knew the material was obscene. *State v. Locks*, 397 P. 2d 949 (Ariz. 1964); *State v. Sul*, 146 Conn. 78, 147 A. 2d 686, 691 (1958); *Demetropolos v. Commonwealth*, 342 Mass. 658, 175 N.E. 2d 259, 262 (1961); *State v. Oman*, 261 Minn. 10, 110 N.W. 2d 514, 520 (1961); *Cohen v. State*, 125 So. 2d 560, 563 (Fla. 1961); *State v. Hudson County News Co.*, 35 N.J. 284, 173 A. 2d 20, 23 (1961); *State v. Ramos*, No. 15235, D.C. Iowa, Pottawattamie County, Council Bluffs (April 7, 1966), unreported.

material involved is not obscene would appear to be susceptible of sweeping and improper applications and is a potential deterrent to constitutionally protected activities. Moreover, to deny one who is accused of selling an alleged obscene book the opportunity to present evidence that he had no knowledge that the book was obscene is a denial of a due process "in the primary sense", the right to be meaningfully heard in one's defense. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 681; *Saunders v. Shaw,* 244 U.S. 317; *Hovey v. Elliott,* 167 U.S. 409, 417.

An instruction to a jury in a federal obscenity prosecution that conviction may be predicated solely on proof of knowledge of contents does violence to the free speech and press and due process provisions of the Constitution. This Court has repeatedly emphasized that sex and obscenity are not the same, from which it follows, it is submitted, that the mere fact that a publisher, distributor or bookseller knows that the contents of a writing concerns itself with sex does not rationally mean that he knows that such book is obscene. See, *Grove Press, Inc. v. Gerstein,* 378 U.S. 577; *Tralins v. Gerstein,* 378 U.S. 576; *A Book etc. v. Attorney General of Massachusetts,* 86 S. Ct. 975; *Grove Press, Inc. v. Christenberry,* 276 F. 2d 433 (2 Cir. 1960), affirming 175 F. Supp. 488 (D.C. N.Y. 1959).

To permit a conviction solely upon proof of knowledge of contents of a writing without proof of knowledge of obscenity is in effect to punish guiltless behavior. Such a standard permits arbitrary presumptions of facts essential to guilt; undermines all the procedural safeguards required in prosecutions involving speech and press; and encourages the self-censorship and pri-

vate suppression of constitutionally protected material which the Constitution is intended to prevent. *Speiser v. Randall,* 357 U.S. 513; *Smith v. California,* 361 U.S. 147; *Freedman v. Maryland,* 380 U.S. 51; *Elfbrandt v. Russell,* 86 S. Ct. 1238; *United States v. Romano,* 382 U.S. 136.

(b) The trial court, upheld by the court below, refused to instruct the jury that a writing could not be deemed obscene unless utterly without redeeming social importance. Moreover ,the trial court, upheld by the court below, refused to instruct the jury that the alleged pruriency of the material was not to be balanced against the social importance of the material, and that the presence of matters of social importance in the book gains for the book its position as constitutionally protected utterance. The trial court refused these requests to instruct upon the ground that they were "incorrect" statements of the law "as to elements of the offense which is covered" (535a).

In *A Book, etc. v. Attorney General of Massachusetts,* 86 S. Ct. 975, this Court emphasized, as it had heretofore emphasized in *Jacobellis,* that a book cannot be proscribed unless it is found to be ***utterly*** without redeeming social importance. "Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness" (86 S. Ct. at 978, and see fn. 7). The courts below excluded the element of social importance from the offense proscribed by the statutes, and the jury was led to concern itself primarily with the alleged prurient interest of the material, disregarding the social import-

ance of the material and the fact that the contents of the material did not exceed the limits of candor, in the Nation as a whole, in the description and representation of matters pertaining to sex and nudity. Such construction of the statutes does violence to the free speech and press guarantees of the First Amendment. *Roth v. United States,* 354 U.S. 476; *Kingsley Int'l Pic. Corp. v. Regents,* 360 U.S. 684; *Jacobellis v. Ohio,* 378 U.S. 184; *Griswald v. Connecticut,* 381 U.S. 479; *Lamont v. Postmaster General of the United States,* 381 U.S. 301.

(c) The Court of Appeals upheld an instruction of the trial court which advised the jury in effect that a non-obscene writing could be condemned if the jury found the writing to be "filthy" as defined by the Court. The trial court did not instruct the jury as requested that the terms contained in 18 U.S.C. 1461 and 1462 embraced only a single concept of "obscenity", but instead held that the statutes cover material which do no more than treat sexual matters in a "vulgar and revolting way", thus tending to "rouse a feeling of disgust and revulsion" (562a).

The statutes, so construed, create vague, ambiguous and unascertainable standards of guilt, and such overly broad statutes create danger zones within which protected expression may be inhibited and suppressed. *Roth v. United States,* 354 U.S. 476; *Kingsley Int'l Pic. Corp. v. Regents,* 360 U.S. 684; *Jacobellis v. Ohio,* 378 U.S. 184; *Tralins v. Gerstein,* 378 U.S. 576; *Grove Press, Inc. v. Gerstein,* 378 U.S. 577.

This Court has held that the holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene. *Smith v. California.*

361 U.S. at 152. In *Jacobellis,* this Court stated that "it is only 'obscenity' that is excluded from the constitutional protection" (371 U.S. at 188). In *Manual,* the material involved was described as "dismally unpleasant, uncouth and tawdry"; but this was held not to make them "obscene" (370 U.S. at 490). See also, *Flying Eagle Pub., Inc. v. United States,* 273 F. 2d 799, 803 (1 Cir. 1960), cited with approval in *Manual* (370 U.S. at 483-484, fn. 5).

It is submitted that an offense to a sense of propriety in some readers cannot possibly justify the suppression of writings ordinarily protected by the First Amendment. Professors Lockhart and McClure have stated "that a ruling of mere offensiveness cannot constitutionally justify censorship of literature would seem compelled by any reasonable judgment based upon balancing the interests pursuant to the constitutional test for freedom of expression". *Literature, The Law of Obscenity, and the Constitution,* 38 Minn. L. Rev. 295, 378 (1954). See also, Kalven, *Metaphysics of the Law of Obscenity,* Supreme Court Review (1960), 4, 42.

Moreover, as a matter of procedural due process a separate offense of disseminating allegedly "filthy" material was never charged nor tried in the case herein. The letter and spirit of Rule 30 of the Federal Rules of Criminal Procedure were violated by the trial court's failure to inform counsel of its proposed action with respect to the distinction between "obscenity" and "filthy." See, *Downie v. Powers,* 193 F. 2d 760, 767 (10 Cir. 1951). The jury was informed that they could convict on a specific charge never made and on a specific theory never tried. This, it is submitted, was a clear violation of procedural due process. *DeJonge v.*

Oregon, 299 U.S. 353; *Cole v. Arkansas,* 333 U.S. 196, 201.[11]

(d) Turning from the trial court's instructions on "filthy" to the "concept" of "obsenity", the charge reveals a potpourri of erroneous, contradictory and misleading meanings ascribed to the phrase in the statutes—"obscene, lewd and lascivious"—so as to make the law of the case inexplicable to the jury and the statutes so vague and indefinite as to do violence to the provisions of the Constitution. See, *Yates v. United States,* 354 U.S. 298, 312-327; *Terminiello v. City of Chicago,* 337 U.S. 1; *United Brotherhood v. United States,* 330 U.S. 395, 410; *Bollenbach v. United States,* 326 U.S. 607.

The trial court permitted the jury to find that the book was without constitutional protection if it had a tendency to arouse sexual impulses and lead to sexually impure thoughts, or to corrupt and deprave the minds and morals of *those into whose hands the book might fall or was likely to reach.* Since the community was described as including the "young", the "uneducated" and "women and children" (561a), the jury was in effect told that the book herein, charged with being distributed generally in various cities in the judicial district, could be condemned if the jury found that the young and uneducated were likely to read the book and

[11]Whether the statute, so far as the term "filthy" is concerned can be constitutionally applied to communications in letters or writings between private persons not intended for distribution to the general public raises questions not presented here. In *United States v. Limehouse,* 285 U.S. 424, the indictment, unlike the indictment here, charged only the mailing of a "filthy letter". The indictment contained no reference to "obscene, lewd or lascivious" (285 U.S. at 426), nor were there raised the constitutional issues canvassed in *Roth* and subsequent decisions of this Court.

be stirred to lustful or sexually impure thoughts. The charge of the trial court in this respect was essentially the charge of Chief Justice Cockburn in *Regina v. Hicklin,* 3 Q.B. 360, 371 (1868), rejected in *Roth* as unconstitutionally restrictive of freedoms of speech and press (354 U.S. at 489). See also, *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 486-487; *Butler v. Michigan,* 352 U.S. 380.

With respect to each essential ingredient of the term "obscenity", the trial court refused to confine its broad, ambiguous and conflicting instructions (P.I. 25, 644a; P.I. 39, 648a-649a; P.I. 40, 649a; P.I. 52, 652a; P.I. 102, 664a; P.I. 114, 667a; P.I. 125, 669a). The trial court refused to limit its unduly broad definition of prurient interest (P.I. 36, 647a-648a; P.I. 61, 654a; P.I. 62, 654a; P.I. 75, 658a). The opinion testimony of expert witnesses was disparaged unfairly and contrary to law (549a-551a). The Government's theory of the case was presented to the jury (550a-551a), but petitioners' contrary position (538a-539a) was not stated. Moreover, the jury was instructed to take judicial notice of the obscenity laws of "all the fifty states" (558a-559a). It is, of course, a matter of common knowledge that the various States have laws which if applied to the same facts would result in contrary decisions or judgments.

2. Since the Government failed to prove the essential ingredients of the offense charged in the indictment, the judgments of conviction herein deprive peti-

tioners of their liberties and property without due process of law and abridge the exercise of freedoms of speech and press.

The Government made no attempt by evidence to prove that the book here involved went substantially beyond customary limits of candor in the description or representation of matters pertaining to sex. It presented no evidence to show that the predominant appeal of the book was to a shameful or morbid interest in sex. It presented no evidence to show that the book was utterly without social importance.

The Government made no attempt to prove, and contended that it was not required to prove, knowledge by petitioners that the book was obscene. Indeed, with respect to petitioner Aday, the Government's own evidence showed that he insisted on deletions from the book of any language detrimental to any character because of race; which had derogatory remarks with reference to Negroes; which had reference to four-letter words used in a derogatory fashion with regard to women; and certain five-letter words which made derogatory reference to men (248a-249a). The Government's witness testified that these deletions were in accordance with a policy of the business (248a). There were also deleted portions of the story which tended to reflect that everybody in the writing was corrupt (249a). The addition made in the original manuscript was with respect to the principal character thinking of having intercourse with a woman in the story. As pub-

lished, intercourse between the parties actually occurred (258a).

With respect to petitioner Maxey, not only was there a failure to prove knowledge of obscenity, but there is a lack of evidence to prove that he even had knowledge of the contents of the writing.[12]

The Government never established that the book herein was knowingly sent by petitioners from Fresno, California to the specific establishments and cities in the Southern Division of the Western District of Michigan, as alleged in the indictment.

In short, there was no proof in the record offered by the Government to prove the essential ingredients of the offense charged in the indictment, and the uncontradicted evidence on behalf of petitioners establishes the non-obscenity of the writing and the absence of *scienter* on the part of petitioners.

Where the "transcendent value of speech" is involved, due process requires "that the State bear the burden of

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[12]So far as the record here is concerned, nothing in the production, sale or publicity relative to the book herein involved amounts to the "pandering" found in the record by this Court in *Ginzburg v. United States*, 86 So. 2d 942. Indeed, the record is significantly to the contrary and, moreover, unlike *Ginzburg*, this case was tried to a jury and not to a court. The trier of the facts in the case herein never was presented with any issue of "pandering" and no such issue was ever decided by the trier of facts. See, *De Jonge v. Oregon*, 299 U.S. 353; *Cole v. Arkansas*, 333 U.S. 196. See also, *Parr v. United States*, 363 U.S. 370, 391. Moreover, contrary to the views of the courts below, this Court held in *Ginzburg* that commercial activity in itself is no justification for narrowing the protection of expression secured by the First Amendment. It should also be noted that petitioners requested the trial court to instruct the jury that conviction under the indictment depended, among other things, upon proof that each of the petitioners "had the specific intent to appeal to the prurient interest of the average person, reading the aforesaid books" (P.I. 101, 662a-663a), but the trial court refused to give such instruction.

persuasion to show that the [accused] engaged in criminal speech." *Speiser v. Randall,* 357 U.S. 513, 526; *Freedman v. Maryland,* 380 U.S. 51; *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 271, 277-280, 283-288; *Thompson v. City of Louisville,* 362 U.S. 199, 206, and cases cited in fn. 13.

Books and writings do not in themselves prove such elements as contemporary standards, prurient interest or social importance. Whether a book exceeds limits of candor, or appeals to a shameful or morbid interest in sex, or is utterly worthless, can only be established by evidence and not by conjectures, presumptions or subjective reactions. *Tot v. United States,* 319 U.S. 463); *New York Times Co.; et al. v. Sullivan,* 376 U.S. 254; *United States v. Romano,* 382 U.S. 136. As this Court has warned on different occasions, and as the Court of Appeals of the Second Circuit made clear in *United States v. Klaw,* 350 F. 2d 155 (2 Cir. 1965), courts and juries in obscenity prosecutions do not sit to act as censors of material personally distasteful to them.

Without proof by evidence, reviewable by an appellate court, that limits of candor have actually been exceeded, or that a writing appeals to no other interest but prurient interest, or is without any importance at all, there is little assurance, it is submitted, that non-obscene writings can be protected. As was stated by the Court of Appeals in *Klaw,* "it is the record and not our feelings that must control. . . . Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity" (350 F. 2d, at 170).

To permit suppression and punishment without proof of the essential ingredients of an offense, ingredients which are made necessary by the requirements of the Constitution, undermines a broad category of rights guaranteed by the free speech and press and due process provisions of the Constitution. The right to fair notice and hearing, the right of confrontation and the assistance of counsel are meaningless and constitute a mere gloss when the prosecution is not required to prove the elements of an offense. *Pointer v. Texas,* 380 U.S. 400; *Douglas v. Alabama,* 380 U.S. 415; *Brookhart v. Janis,* 86 S. Ct. 1245; *Turner v. Louisiana,* 379 U.S. 466. Without proof of the elements of the offense of obscenity, "it would be altogether too easy for any prosecutor to stand before a jury, display the exhibits involved, and merely ask in summation: 'Would you want your son or daughter to see or read this stuff?' A conviction in every instance would be virtually assured." *United States v. Klaw, et al.,* 350 F. 2d, at 170.

3. Not only was there a failure of proof of the essential ingredients of the offense, but the trial court deprived petitioners of their legal and constitutional rights by the exclusion of oral and documentary testimony, and by the rejection of offers of proof, all intended to establish the nonobscenity of the book and the absence of unlawful knowledge and intent on the part of petitioners.

On the issue of comparison evidence (228 F. Supp. at 191-201, 735a-756a), the trial court initially eliminated from jury consideration categories of writings which the trial court decided "as a matter of law" were not similar to the book here involved (735a). Thus,

there were eliminated "magazines"; "classics"; works "of an undeniable literary value"; books "dealing in a technical way with marriage and the family, and sexual relations"; scientific treatises or text books of supplementary material "in the area of sociology, psychiatry and psychology"; "medical textbooks of any nature"; and "medical treatises" (735a). These were, in addition, asserted to be "non-exclusive descriptions" (735a). This ruling, of course, in one stroke virtually eliminated all comparable material as evidence in the case.

The trial court went further. It held that if a book was found to be comparable, then the book would not be submitted into evidence for any purpose (743a-744a), and "no parts of any book so sought to be introduced will be read to the jury" (744a). If a book, found comparable, cannot be introduced into evidence, and no parts read to the jury, what possible value to an accused in an obscenity prosecution does such comparison evidence have, and what is the function of the jury under such circumstances?

Having thus made the aforesaid preliminary rulings, the trial court advised petitioners that they must convince the court, as a matter of law, that the proffered comparison material enjoys "substantial acceptability in the community", and also "convince the court first as a matter of law in the course of the [qualified] witness' testimony that the books are substantially similar to the challenged books" (744a).

In compliance with the directions of the trial court, petitioners made a written offer of proof (608a-619a). The comparable books named were *Fanny Hill* by John Cleland; *Lady Chatterley's Lover* by D. H. Lawrence; *Tropic of Capricorn* by Henry Miller; *Naked Lunch* by

William Burroughs; *Carpetbaggers* by Harold Robbins; *A Cold Wind in August* by Burton Wohl; *Clip Joint Cutie* by Monte Steele and *Sin Binge* by John Baxter. The offer of proof, twelve pages in length, with detailed statements as to the evidence to be adduced with respect to each book on the issues of similarity and acceptability (608a-619a) was dismissed by the trial court as "conclusions only" (745a). Moreover, stated the trial court, books like *Lady Chatterley's Lover* and *Tropic of Capricorn* were not comparable as a matter of law (332a-335a).

The offer of proof being rejected, the trial court now permitted the "qualified witness" to attempt to prove what the court had already apparently decided was not provable (335a). The witness Kirsch was called by petitioners. Upon examination, the trial court agreed that he was a qualified witness (325a). Petitioners then sought to prove through the witness the comparability of six of the writings named in the written offer of proof to the book named in the indictment, to wit, *Carpetbaggers, Fanny Hill, Lady Chatterley's Lover, Tropic of Capricorn, A Cold Wind in August* and *Naked Lunch* (358a-359a), the books which the witness had read. Stated the trial court:

> "Well, you'll have to establish on the record, out of the presence of the jury, the similarity of the books before you go into what you propose this witness would testify to in the presence of the jury" (360a-361a).

Therefore, out of the presence of the jury, the witness testified with respect to the six offered books (361a-409a). Despite the witness' conceded expertise and despite the testimony of the witness that the mate-

rial was comparable, all of the books, on objection of the Government, were refused admission into evidence as comparison testimony. A perusal of the writings, as well as the testimony of the expert witness, reveals that they were clearly comparable writings generally accepted in the community. Their admissibility as evidence was clear; the weight to be given to such evidence was, of course, a matter for the jury.

Other offers of proof (626a-637a) and other comparable books held constitutionally protected material by judicial opinions were rejected as not "generally acceptable", although concededly similar (469a-474a, 493a-494a).

Unmentioned by the trial court in its written opinion, and unmentioned by the Court of Appeals, was the refusal of the trial court to permit comparable testimony to be offered from the Kalamazoo Library of Kalamazoo, Michigan (468a, 474a, 481a-483a), and from the Fiction Department of the Grand Rapids Library (414a-416a). Also excluded was evidence offered by petitioners to show that comparable paperback books were sold in the City of Grand Rapids and in every city named in the indictment herein, and indeed throughout the Nation, together with covers and blurbs similar to the book involved herein (416a-423a), although the trial court permitted, at the request of the Government, the jury to consider the covers of the indicted books and blurbs (417a-420a, 717a). Offers of proof to show that the Government's own witnesses, the wholesalers and retailers to whose establishments the books named in the indictment had allegedly been shipped, had distributed for years paperback books similar in cover, blurbs and appearance to the cover and blurbs on the book herein

involved were all rejected (282a-283a, 429a-432a, 622a-625a). And offers of proof with respect to newspaper stories reflecting instances similar to those contained in *Sex Life of a Cop* were also rejected (402a-403a).

No expert testifying on contemporary community standards or literary value with respect to *Sex Life of a Cop* was permitted to mention any other comparable book in his testimony, nor his counsel permitted to mention another book before the jury (735a). The expert witnesses could venture the opinion before the jury that community toleration has broadened, and that *Sex Life of a Cop* was within the area of community toleration — *but the bases of the experts' opinions* were entirely unknown to the jury by reason of the trial court's rulings (237a-238a, 241a, 251a-253a, 255a-259a, 261a-262a, 273a-280a, 308a, 311a-312a, 325a-339a, 346a, 358a-396a, 398a, 411a, 443a, 466a-467a, 541a-542a).

The exclusion of the evidence proffered by petitioners was contrary to law and amounted to a denial of due process of law and an abridgment of freedoms of speech and press. *Smith v. California,* 361 U.S. 147, 165, 171-172; *Speiser v. Randall,* 357 U.S. 513, 520; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 497; *In re Harris,* 56 Cal. 2d 856, 16 Cal. Rptr. 889, 366 P. 2d 305 (1961); *Yudkin v. State,* 229 Md. 223, 182 A. 2d 798.

4. The book *Sex Life of a Cop* by Oscar Peck is entitled to the protection of the free speech and press provisions of the First Amendment. Petitioners invoke the constitutional judgment of this Court. *Jacobellis v. Ohio,* 378 U.S. 184, 187-190. In a constitutional sense, the said book is not obscene.

The book *Sex Life of a Cop* has ideas of social importance; does not exceed contemporary standards in

the depiction of sex; and does not appeal to a shameful or morbid interest in sex. Measured by the constitutional standards for judging obscenity as enunciated and applied by this Court, the book is not obscene and is entitled to the protections of the First Amendment.[13]

Sex Life of a Cop is a picaresque novel. It is a farcical and satirical writing which makes a social point. The book deals with current standards of behavior and morality in an ordinary municipality. The writing demonstrates that there is much hypocrisy and corruption among persons, both lay and official, in the sense that they do not fulfill their public responsibilities. That the corruption is revealed often in terms of sexual behavior is a theme common among other writers who have explored similar areas.

Petitioners have printed in Appendix K hereto some excerpts from the book which demonstrate the social problems with which the writing is concerned.

It is submitted that the book portrays with considerable accuracy and within the permissible confines of a work of fiction the problems which are attested to daily by the newspapers, the learned journals, radio and television, motion pictures, works of fiction and nonfiction, and, in short, all media of communication. It is

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[13] *Times Film Corp. v. City of Chicago*, 355 U.S. 35 ("Game of Love" — film); *One, Inc. v. Olesen*, 355 U.S. 371 ("One — The Homosexual Magazine"); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 ("Sunshine and Health" — nudist magazine); *Kingsley Int'l Pic. Corp. v. Regents*, 360 U.S. 684 ("Lady Chatterley's Lover — film); *Jacobellis v. Ohio*, 378 U.S. 184 ("The Lovers" — film); *Tralins v. Gerstein*, 378 U.S. 576 (*Pleasure Was My Business*); *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (*Tropic of Cancer*); *A Book etc. v. Attorney General of Massachusetts*, 86 S. Ct. 975 (*Fanny Hill*). See also, *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433 (2 Cir. 1960) affirming 175 F. Supp. 488 (D.C. N.Y. 1959) (*Lady Chatterley's Lover*).

true that the book is critical of officials of government, but the book has significant social importance for just that reason. "Truth," this Court has stated, "may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison v. Louisiana*, 379 U.S. 64, 74.

Moreover, the undisputed testimony of the experts, Robert J. Kirsch, Literary Editor of the Los Angeles Times, author, novelist and teacher (289a-292a, 327a-329a); Edward L. Galligan, Associate Professor at Western Michigan University (432a-435a); and Guy Endore, noted novelist, biographer and screen writer (495a-500a), was uniform in averring that the book had ideas of social significance (352a-355a, 458a-460a, 524a-531a).

The book clearly does not exceed the customary limits of candor in the depiction of sex and sex relations. The sexual language and the language of the sexual passages and the manner of handling these passages do not go beyond customary limits of candor of present-day writing "and indeed, the language falls short of it" (357a). The sexual descriptions in the writing are less candid and less vivid than the accounts in quite a considerable number of contemporary books (466a). This conclusion is not only compelled by a comparison of the book herein with those writings which have constitutional protection by the judicial determination of this Court and other courts in the federal and state jurisdictions, but also from a perusal of the contemporary scene where there is a frankness and candor in discussion of sex in books which are generally accepted in the community today, and which frankness and candor the book here involved does not even attempt.

5. Petitioners submit that the multiple venue prosecutions and forum-picking now authorized by 18 U.S.C. 1461 and 1462, as amended in 1958, render the statutes unconstitutional in violation of the provisions of the First, Fifth and Sixth Amendments to the United States Constitution.

When this Court rendered its decision in *Roth* in 1957, no question of venue was raised in the argument before the Court and, indeed, no question could be raised because the venue in both the federal and state prosecutions was laid where the deposit for mailing had been made. Prior to 1958, the offense under the federal obscenity statutes was complete when the deposit for mailing or delivery was made. *United States v. Ross,* 205 F. 2d 619 (10 Cir. 1953).

For many years, postal officials sought to change the venue limitations of the obscenity statutes. Their efforts were crowned with success when they found a receptive audience in a House Judiciary Subcommittee then headed by Congressman Francis Walter. See, Paul and Schwartz, *Federal Censorship: Obscenity in the Mail* (1961), 185-186. The Post Office Department and the Attorney General urged Congress to enact H.R. 6239 in order "to overcome the effect of the Ross decision, making it possible to prosecute violators of section 1461 at the place at which the objectionable matter is mailed, at the place of address or delivery, or in any judicial district through which such mail matter is carried." 1958 U.S. Code, Cong. & Adm. News, pp. 4707-4708.

The Senate initially adopted a middle view between the *Ross* rule and the rule contended for by the Post Office Department, this upon the ground "that unrestricted 'forum shopping' can lead to abuses and is,

therefore against public policy." S. Rep. 1839, 1958 U.S. Code, Cong. & Adm. News, p. 4705. The House, however, declined to go along with the Senate in amending the statute to punish only the deposit or receipt of material, and the final conference report which was adopted made the offense a continuing crime "from the point of deposit, in transit, and at the point of delivery." Conf. Rep. (H.R. 6239), 1958 U.S. Code, Cong. & Adm. News, p. 4709.

When H.R. 6239 was finally reported out and passed, "the Judiciary Committee openly warned that United States prosecutors were not to abuse their new power." Paul and Schwartz, *Ibid.* at 186. In response, the Department of Justice hinted at the adoption of an unofficial policy which restricted venue "either to the place of mailing or to an area where a large volume of material is sent—to areas where the dissemination has had an 'impact,' as one government lawyer put it." Paul and Schwartz, *Ibid.*, at 186.[14]

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[14]The alleged "unofficial policy" restricting venue to the place of mailing or to an area where a large volume of material has been sent has in actual practice become a dead letter. Book publishers and distributors, as well as printers, authors and others involved in the circulation of the press, are being increasingly subjected to prosecutions under the statutes, as amended, in far off jurisdictions where the so-called impact has been minimal, that is, where in the course of national distribution throughout the country the books or other writings sent to the particular area have been extremely small and this known to the Government. It has become plain that the statutes are now being used by Government officials to place the greatest financial strain upon publishers, distributors and other persons, to make it impossible to bring witnesses and experts in defense of the accused and to impose such burdens as will finally put the different publishers and distributors out of business even though such publishers and distributors may be ultimately successful in vindicating their rights.

In Appendix L printed hereto, petitioners detail the legal proceedings involving petitioner Aday prior to 1958 and his vindication, and the subsequent prosecutions instituted against the same petitioner after 1958.

This Court admonished in *Roth* that the door barring federal intrustion into the areas of speech and press must be kept "tightly closed" and opened only "the slightest crack" necessary to prevent encroachment upon more important interests. The substantial procedural changes made in the federal obscenity statutes by the 1958 Amendments permitting multiple venue prosecutions have, it is submitted, resulted in a wide opening of the door and in a substantial intrusion into protected expression. The operation and effect of the method by which the circulation of books and other writings is restrained by the federal obscenity statutes as amended should, it is submitted, be subjected to "close analysis and critical judgment" by this Court. *Speiser v. Randall,* 357 U.S. 513, 520.

In a series of decisions, this Court held that different legal procedural devices which had the effect of inhibiting freedoms of speech and press could not be upheld; that a statute on its face which is clearly capable of many abuses threatening those who exercise their rights of free expression with the burdens of a criminal prosecution is invalid; and that where a statute in addition has a potentially inhibiting effect on the exercise of freedoms of speech and press, the statute is also constitutionally invalid because it fosters self-censorship and the denial of access by the public to constitutionally protected material. *Smith v. California,* 361 U.S. 147; *Marcus v. Search Warrants of Property etc.,* 367 U.S. 717; *A Quantity of Copies of Books, et al. v. Kansas,* 378 U.S. 205; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58; *Freedman v. Maryland,* 380 U.S. 51. See also, *New York Times Co., et al. v. Sullivan,* 376 U.S. 254; *Dombrowski, et al. v. Pfister,* 380 U.S. 479; *Giaccio v.*

Pennsylvania, 382 U.S. 366; *Elfbrandt v. Russell*, 86 S. Ct. 1238.

As the Honorable J. Skelly Wright stated in *Reed, et al. v. Corcoran*, 354 F. 2d 519, 522 (D.C. Cir. 1965), the question as to whether the prosecution "may constitutionally be allowed a multiple choice of forum" is a substantial one. See also, *Ginzberg v. United States*, 86 S. Ct. 942, 944, fn. 1.

6. The petitioners submit that the trial court deprived petitioners of clear, legal and constitutional rights in holding that the trial court was in effect without power or discretion to grant a transfer of proceedings in a federal obscenity prosecution, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, in view of the 1958 Amendments to 18 U.S.C. 1461 and 1462. The trial court declined to exercise its authority when the facts before the court made it the duty of the court to do so, petitioners have duly presented an uncontradicted record imperatively requiring a change of venue pursuant to Rule 21(b). The trial court misjudged its powers and grossly abused its discretion in refusing to grant petitioners' motion for transfer of proceedings, petitioners having conclusively shown that such transfer was necessary in the interest of justice, in order to afford each of petitioners a fair trial, and in order to avoid deprivation of each of petitioner's liberty and property without due process of law and the abridgment of freedoms of speech and press.

Rule 21(b) was designed as an instrument of justice, and to insure the fair administration of criminal justice in the federal courts of the United States. The Rule was promulgated primarily to avoid in particular cases the onerous and unfair consequences of statutes

like 18 U.S.C. 1461 and 1462 permitting multiple prosecutions and forum-picking. The case herein was one which peculiarly called for the mitigating relief provided by Rule 21(b). Federal Rules of Criminal Procedure, Rule 21(b); *United States v. Olen, et al.*, 183 F. Supp. 212 (D.C. N.Y. 1960); *United States v. Erie Basin Metal Products Co.*, 79 F. Supp. 880 (D.C. Md. 1948); *United States v. National City Lines*, 7 F.R.D. 393 (D.C. Cal. 1947); Notes of Advisory Committee on Rules Under 21(b); *Cyclopaedia of Federal Procedure* (2d ed. 1952), Vol. II, §39.150, p. 110.

The question of the relation between the federal obscenity statutes and Rule 21(b) is of great public importance, not only in the fair administration of criminal justice, but in its potential effect upon the free circulation of the press. If a national distributor of books and other media of communication may be prosecuted in any judicial district in the United States where the books are deposited, in transit, or delivered, and if district courts are without power or discretion in any such obscenity prosecution to grant a change of venue in the interest of justice when the record imperatively requires such a change of venue, then the free circulation of the press and the public's access to constitutionally protected material are plainly undermined. *Smith v. California*, 361 U.S. 147; *Marcus v. Search Warrants of Property, etc.*, 367 U.S. 717. See also, *Ginzburg v. United States*, 86 S. Ct. 942, 944, footnote 1.

7. Despite the specific request of petitioners that the book involved be read openly in court to the jury, the trial court refused to allow such reading. What the trial court overlooked was that the issue here was not the subjective reactions of the jury, or of the court, or

of counsel, but of the right of the public to know what was going on, and whether or not the petitioners were receiving justice. This is the true significance of a public trial and the reason why a public trial is a defendant's right under the Constitution of the United States. *In re Oliver*, 333 U.S. 257, 266.

The gist of the case against petitioners was that they had disseminated a book entitled *Sex Life of a Cop* which allegedly was obscene, lewd, lascivious and filthy. A verdict of guilt was returned against petitioners and they were respectively sentenced to 25 and 15 years' imprisonment, later reduced to 10 and 5 years, and fined a total of $69,000, for the dissemination of a single book. Yet, the public which sat in that courtroom in Grand Rapids did not know and does not know today what the contents of the book are or why petitioners received such harsh and cruel sentences. In effect, the public was as much excluded from the essential portion of the trial herein as if they had actually been prevented from entering the courtroom.

8. The trial court held that petitioners' motion to dismiss the indictment (grand jury) was properly stricken on the motion of the Government (99a-112a) because petitioners had impliedly and expressly waived any objections to the array by failing to make the motion prior to the return of the indictment. The trial court held that petitioners' motions made prior to trial and pursuant to Rules 6 and 12 of the Federal Rules of Criminal Procedure came too late, and that petitioners had waived their objection to the array by failing to make their motions as soon as they became aware that an indictment might be returned by the grand jury. Reliance was placed upon *Agnew v. United States*, 165 U.S. 36. See, Appendix B, herein.

The Federal Rules of Criminal Procedure were adopted in 1945, almost fifty years after the decision of this Court in *Agnew*. The Notes of the Advisory Committee under Rule 6 of the Federal Rules of Criminal Procedure specifically state: "Failure to challenge is not a waiver of any objection. The objection may still be interposed by motion under rule 6(b)(2)." See also, the Notes of the Advisory Committee on Rules under Rule 12 of the Federal Rules of Criminal Procedure.

In view of the trial court's ruling striking petitioners' motion to dismiss the indictment, there was never any complete presentation of the evidence on this issue in the case; findings of fact and conclusions of law were never submitted, despite the fact, as the record shows (128a-192), there were serious legal questions involved as to whether or not the grand jury had been properly selected. It appears clear that the trial court declined to make an appropriate determination of the issues before the court because it had concluded that the challenge to the array was waived, and therefore required no determination on the merits. In all respects, the actions of the trial court were, it is submitted, wholly erroneous, and arbitrarily deprived petitioners of basic legal and constitutional rights.

9. Petitioner Aday has been subjected to consecutive sentences of imprisonment, and maximum fines have been imposed consecutively upon all petitioners, all for the alleged shipment of a single book to the Western District of Michigan in August and September 1959.

Thus, according to the courts below, a decision to prosecute for a book dealing with sex in any judicial district in the United States could result in an indict-

ment charging an infinite number of counts and authorize the imposition of 5-year sentences and maximum fines of $5,000 on each count. There does not appear to be any doubt that upon the trial court's theory a national distributor of an allegedly obscene book might face punishment in any judicial district in the United States to a lifetime imprisonment and an astronomical figure in fines. Under such rule of law, any publisher or national distributor of a book dealing frankly with sex would clearly hesitate to send such a book into circulation for the general public.

Congress, it must be presumed, did not intend, by amendments to 18 U.S.C. 1461 and 1462 in 1958, to do violence to constitutional standards. Indeed, as the legislative history indicates (1958 U.S. Code, Cong. and Adm. News, p. 4012, *et seq.*), Congress was concerned that the Post Office Department and Department of Justice should not abuse the provisions by forum-picking which might abusively lead to the suppression of constitutionally protected material. In view of the constitutional provisions and legislative history, the statutes here, which should be strictly construed because of their penal nature, can only be reasonably interpreted to mean that the prosecutor at the time of an indictment can only treat the dissemination of a single book as a single offense for which there can be only one punishment. The offense made punishable under 18 U.S.C. 1461 and 1462 is conduct which arises from a "singleness of thought, purpose or action, which may be deemed a single 'impulse' ". *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 224.

Moreover, the act of distribution with respect to one book is essentially intended as a single act. A policy of

the law which would permit the prosecutor to multiply the offenses by the number of outlets to which the book is sent would manifestly lead to limitless punishment and to suppressive effects, contrary to the law and the Constitution. See, *Yates v. United States*, 355 U.S. 66. See also, *Crepps v. Durden*, Cowp. (Eng.) 640, cited with approval in *Ex parte Snow*, 120 U.S. 274, 283.

10. The imposition of 10 years and 5 years' imprisonment upon the individual petitioners, with total fines of $69,000, for the mailing and shipment of a single book is so grossly disproportionate to the offense committed as to be completely arbitrary and shocking to a sense of justice. In an age where bookburning has been universally condemned, it is contrary to all civilized standards to impose sentences of 10 years and 5 years upon persons allegedly responsible for the mailing of a single writing. Just as the concept of consecutive punishment for a single offense constitutes an unusual punishment interdicted by the Constitution, so the imposition of total punishment of 15 years and $69,000 in fines for the mailing of an allegedly single writing offends the constitutional provisions. *Weems v. United States*, 217 U.S. 349, 551; *Robinson v. California*, 370 U.S. 660, 675-676.

Nor should it be overlooked that the cruel and unusual punishment imposed here has deterrent effects upon the circulation of the press and serves as an abridgment of rights guaranteed by the First Amendment. In safeguarding the freedoms from cruel and unusual punishment under the Eighth Amendment, there is also the guarantee that the freedoms of speech and press protected by the First Amendment will also be preserved. *Roth v. United States*, 354 U.S. 476;

Smith v. California, 361 U.S. 147; *Marcus v. Search Warrants of Property, etc.*, 367 U.S. 717; *Jacobellis v. Ohio*, 378 U.S. 184.

Moreover, the requirement that petitioner Aday furnish $75,000 in cash bail pending appeal was a violation of the excessive bail provisions of the Eighth Amendment and constitutes a manifest abuse of judicial discretion by the trial court. Such a high bail in view of the fact that the petitioner had always obeyed the orders of the trial court and had always made required appearances before the court, and where there was not the slightest evidence that petitioner would not comply with any final judgment of the court, amounted to no more than additional punishment over and above the fines and imprisonment imposed upon petitioner. *United States v. Motlow*, 10 F. 2d 657, 662 (before Mr. Justice Butler of the United States Supreme Court, sitting as Circuit Justice in the Circuit Court of Appeals for the Seventh Circuit, February 1926). See also, *Stack v. Boyle*, 342 U.S. 1.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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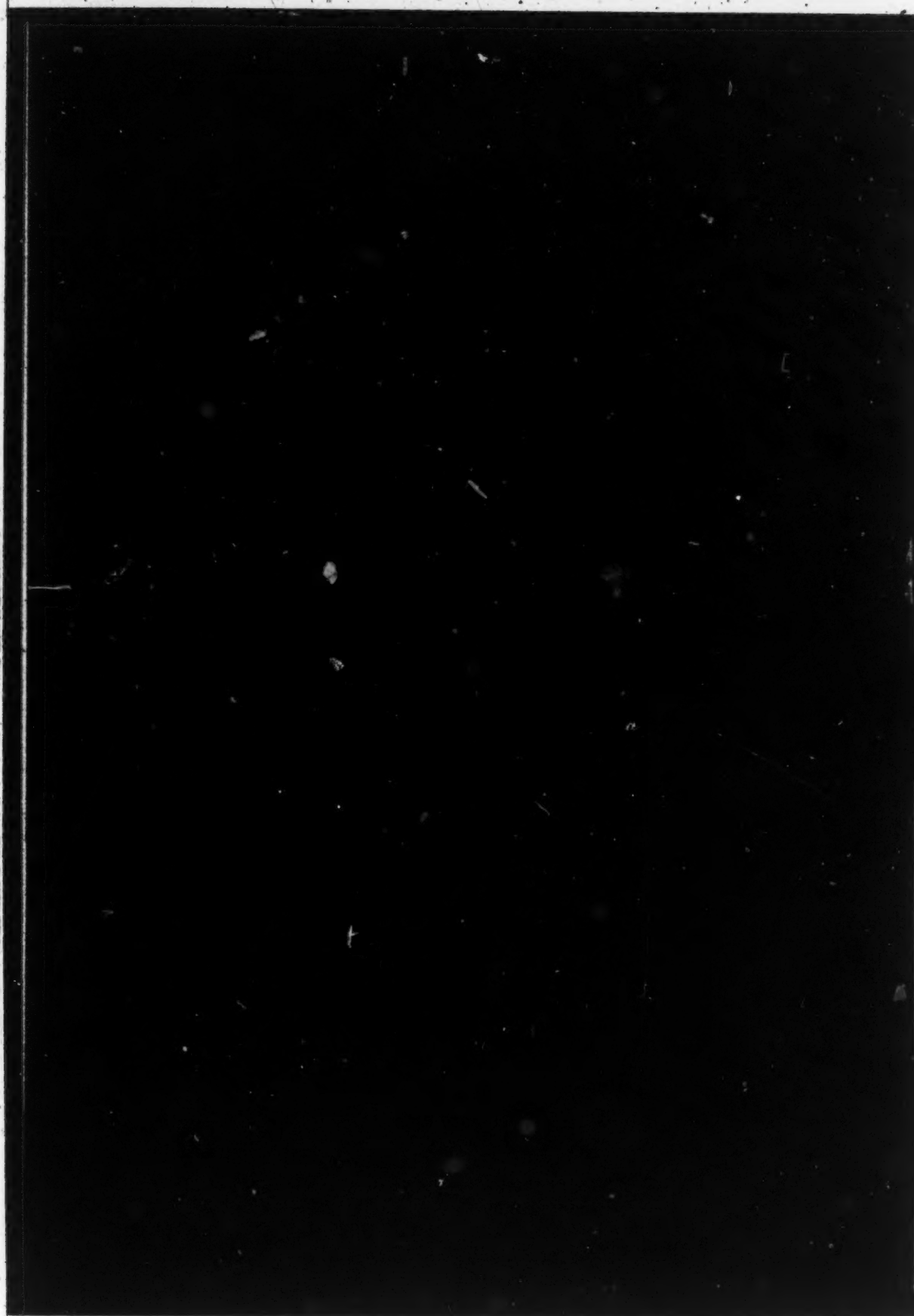

APPENDIX A.

Opinion of the Court of Appeals.

Appeal From the U. S. District Court for the Western District of Michigan.

United States Court of Appeals for the Sixth Circuit.

United States of America, *Plaintiff-Appellee*, v. West Coast News Company, Inc., a California Corporation, Wallace DeOrtega Maxey, and Sanford E. Aday, *Defendants-Appellants*. Nos. 15792, 93, 94, 95.

Filed March 22 1966.

Decided March 22, 1966.

Before Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

O'Sullivan, Circuit Judge. This is an appeal from a judgment entered upon a jury verdict convicting defendants-appellants, West Coast News Company, a California Corporation, and Wallace DeOrtega Maxey and Sanford E. Aday, California residents, of violations of Sections 1461 and 1462, Title 18, U.S.C.A. The charged offenses arose from the delivery into Michigan by mail and common carrier of allegedly obscene books, including one entitled *Sex Life of a Cop*.[1] Trial was in the United States District Court for the Western District of Michigan. Substantial fines were imposed upon the corporate and individual defendants and the latter received severe prison sentences.

Our task is lightened by our view that the challenged book is by any standard obscene. It was inevitable that in today's bold and flourishing business of pornography there would come along a writing so bad that no amount of sophisticated dialectics could absolve it from clas-

[1]The indictment charged that eight books in the shipments were obscene, but the jury disagreed as to all but *Sex Life of a Cop*.

sification as "hard core". Such is the book we deal with. Thus we are spared the burden of attempting our own contribution to the already abundant literature on what is and what is not obscene. Although it was the jury's function to make the final decision as to whether crimes were committed by the commerce in this book, we are put to an initial and independent judgment because of appellants' contention that, as a matter of law, the book is not obscene.

We are properly charged with such responsibility by *Jacobellis v. Ohio*, 378 U.S. 184, 12 L.Ed.(2) 793 (1964), where the United States Supreme Court by footnote reference (p. 188) finds relevant one author's observation that,

> "This obligation—to reach an independent judgment * * * appears fully applicable to findings of obscenity by juries, trial courts, and administrative agencies. The Supreme Court is subject to that obligation *as is every court before whom the constitutional issue is raised.*" (Emphasis supplied)

In making this judgment, we apply the test announced by *Roth v. United States*, 354 U.S. 476, 489, 1 L.Ed. (2) 1498 (1957) and conclude that "to the average person, applying contemporary community standards, the dominant theme of the material [the book *Sex Life of a Cop*] taken as a whole appeals to prurient interest."

We will not attempt illumination by extensive recital of the book's contents. This short description will suffice. *Sex Life of a Cop* is a paperback with a cover picturing a woman (the wife of the Mayor of the town) trying unsuccessfully to hide her nakedness behind the grotesque, underwear-clad figure of the town's Chief of Police, both of them having been interrupted in their

lover's lane dalliance by two of the town's police officers. The latter pair are the heroes of the narrative. Their discovery of the Chief and his lady was not the product of zeal to enforce the law, but of their effort to beguile the monotony of their round of duty by such surprise intrusions.

Inside the covers are pages which the defendants' experts call "blurbs". These are short, but meaty, excerpts from other books available from the publishers, and give prurient promise of the books' contents. They demonstrate that the publisher, at least, suffered from no illusions as to the interests to which the book was directed. One of the blurbs, however, has an intellectual flavor. It identifies as an author, Wallace DeOrtega Maxey, *Doctor of Divinity*, whom we assume to be the defendant of the same name. "Dr. Maxey" is described as a minister who has cast off the shackles of prudery, (now an evangelist for freedom) whose "views are in sharp contrast with those of most other ministers, but so were the views of Columbus with those of the other navigators of his time. The new idea replaces the old; the world is not flat."

The 147 pages of the alleged novel are generously faithful to the promise of the blurbs. Without palliating interruption, the story moves quickly from one sexual enterprise to another. So numerous are these events that even the practiced skill of the authors runs out of fresh imagery and dully repeats his supply of leering adjectives. The chief actors are a police sergeant and his fellow occupant of the appropriately named "prowl car". These officers, except for some needed rest from their amours, devote most of their on-duty and off-duty hours to successful sex encounters with whatever fe-

males come within their view. Their conquests range from a virgin to a "100 dollar" prostitute. The wives of the Chief of Police and the Mayor of the town, the new police dispatcher, friendly waitresses, two nurses who promptly take off their clothes when the busy officers, otherwise unheralded, climb through their open window, a drunken "society" lady who is first rescued from a corner lamppost and then raped in the back seat of the prowl car, and a miscellany of other willing ladies, make up the cast. Every female identified in the story is easy prey for the officiers. With their husbands away, some married ladies gain the officer's sexual services by false night calls to the police dispatcher complaining of a "prowler." Chivalrous response by the prowl car is rewarded by amorous receptions. Even the wife of his fellow officer is not overlooked by Sergeant Thorne. The drama concludes with a smashing *denouement* when the sergeant discovers, as an eyewitness, that his own beloved Alice has been enjoying his outranked, prowl-car-pal's offerings. The moral lesson of retribution, which defendants' experts claim gives this book a social value, subtly emerges in the cuckolded sergeant's plaintive soliloquy "What in the world have I ever done to deserve this?" Thus ends the play.

We cannot believe that the First Amendment's great guarantee of freedom of expression can be elasticized to embrace *Sex Life of a Cop*. We conclude this part of our opinion with imitation of the wise and timesaving succinctness employed by Mr. Justice Potter Stewart in *Jacobellis*. Avoiding agonizing dissertation on the subject of obscenity, he said "I know when I see it and the motion picture involved in this case is not that." May we then, exercising the common sense which we like to

think is a mark of today's federal judges, say that we know hard core pornography when we see it, and *Sex Life of a Cop* is just that. This initial and required judgment on the matter will be our ruling that the United States Constitution was not offended by letting this case go to the jury.

We will discuss such of the other charged errors as we consider merit consideration. Many of these were discussed adequately and at length in opinions of the District Judge, published as *United States v. West Coast News Company*, 216 F. Supp. 911 (W.D. Mich. 1963) and *United States v. West Coast News Company*, 228 F. Supp. 171 (W.D. Mich. 1964). These opinions bring together various rulings made during the course of and after trial. In the main, they are dispositive of the questions before us.

1. Rulings on Defendants' Expert Testimony.

At pretrial, the subject of expert witnesses was discussed. The District Judge announced that he would allow each side to use two. Appellants' counsel requested the use of four. The judge allowed him three. Defendants were to make the selection of which three of their four witnesses they would use. We think the limitation on the use of experts was within the trial judge's discretion. See Annot. 5 A.L.R.(3) 238, 257 § 11. We do not consider that he abused it. See his discussion at 228 F. Supp. 187-191.

The District Judge refused to allow appellants' experts to give their opinion as to whether *Sex Life of a Cop* was obscene. Such was the ultimate issue for the jury's determination. We find no error in this regard. While we have not been cited to any decision squarely on this point, we consider our view supported by respect-

able authority. *United States v. Levin*, 83 F(2) 156, 157 (CA 2, 1936); *Volanski v. United States*, 246 F (2) 842, 844 (CA 6, 1957); *Womack v. United States*, 294 F(2) 204, 206 (CA D.C. 1961), *cert. den.* 365 U.S. 859; *Kahm v. United States*, 300 F(2) 78, 84 (CA 5, 1962) *cert. den.* 369 U.S. 859; *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 NE(2) 840 (1945). And see the District Judge's discussion at 228 F. Supp. 182-191.

Defendants' experts were allowed to express their opinions as to the literary value and social importance of *Sex Life of a Cop*, as well as their views as to its acceptability by "contemporary community standards." The experts were Robert J. Kirsch, literary editor of the Los Angeles Times and part time teacher of "creative writing" at the University of California, Edward L. Galligan, professor of English at Western Michigan University, and one Guy Endore, an author who has lectured at various universities.[2] Among other observations, the witness Kirsch gave the book literary standing as a novel because "it has what I would consider to be the minimal qualities of a novel, it has prose composition that relates incidents in a narrative scenic form, *it has a beginning, middle and an end.*" (Emphasis supplied.) In his view, contemporary community standards will put up with the use of language "of every kind and level" and today's accepted literature treats "in very explicit detail" with "abnormality and perversity of all the

[2]Defendants' fourth expert, excluded under the ruling limiting the number of experts, was Dr. Martha Boaz, Dean of the School of Library Science of the University of Southern California. The offer of her proof asserted that she was prepared to testify that there was nothing in *Sex Life of a Cop* and its accused companions "that would cause her to hesitate to submit them to students to read."

convolutions of sexual activity." Professor Galligan buttressed his assertion that *Sex Life of a Cop* did not offend comtemporary community standards with the profound observation that "the writer wouldn't write about it [sex] unless there is an audience willing to read about it." Exhibiting his expertness, he said that, vis-a-vis today's sex literature, *Sex of a Cop* loses standing because its sexual scenes are "not vivid eniugh." As to the book's literary value, he described it as "a novel of social realism and social criticism, written in the tradition of the picaresque novel" and added that "*for the sort of book that it is,* for its audience, and *for what it is trying to do,* I think it has some real value." (Emphasis supplied.) The author-witness Endore found literary validity in *Sex Life of a Cop* in its exposure of "the methods of the police in this little town" and "the sexual life of the cops." He felt that "anything in the life of people is valid material for a novel." These experts had the view that our national community standards had so deteriorated, or "matured," that *Sex Life of a Cop* did not offend. Social importance was found in the retribution that was visited upon the sergeant by his own wife's infidelity and in the corruption and immorality of all of the actors, police and municipal officials, their wives and every female encountered by the heroes. It is indeed frightening to be aware that traffickers in such a book as we deal with can call to their defense the schoolmen and others with the intellectual eminence claimed by these experts. Were it not for that, we might wonder whether these distinguished experts were not really spoofing us with their elegant esoterica. We may assume, however, that their testimony was expressive of sincere intellectual conviction. We cannot, however, fault the jury for finding unconvincing these experts'

rationalization of the social worth and literary importance of *Sex Life of a Cop*.

A further error charged was the trial judge's refusal to allow defendants' experts either to identify to the jury various books claimed comparable to *Sex Life of a Cop* and which had been found by the United States Supreme Court or other courts not obscene, or to identify other books allegedly accepted by comtemporary community standards. To avoid intolerable flooding of the record the District Judge, correctly in our view, advised appellants' counsel to select a limit of eight books for such use. He admonished that these books could be so used only if it were proven that they were in fact comparable to the books covered by the indictment, and had in fact become acceptable by contemporary community standards. Defense counsel thereupon chose the following eight books: *Fanny Hill, Tropic of Capricorn, Lady Chatterly's Lover, Naked Lunch, Carpetbaggers, Cold Wind in August, Clip Joint Cutie* and *Sin Binge*.

To test the comparability of the first six books, a preliminary voir dire of defendants' experts was conducted out of the presence of the jury. From his evaluation of the experts' characterization of the literary quality of these books and from his reading of them, the District Judge concluded that they were so dissimilar to *Sex Life of a Cop* and its companions as to render them irrelevant and, hence, inadmissible. From our review of the record, we are satisified that such ruling was correct. See *Womack v. United States*, 294 F(2) 204, 206 (CA D.C. 1961), *cert. den.* 365 U.S. 859, and Judge Fox's ample discussion of the point at 228 F. Supp. 191-201.

The government conceded that *Sin Binge* and *Clip Joint Cutie* were similar to the challenged books. They were denied admission, however, for lack of proof that they had become acceptable by community standards. We consider such ruling correct, as was the trial judge's refusal to admit a flood of other material solely on the claim that books of the same general trend, embellished with like "blurbs," could be found on the shelves of many book stores and news racks. See *People v. Finkelstein,* 11 N.Y.(2) 300, 229 N.Y.S.(2) 367, 183 N.E. (2) 661, *cert. den.* 371 U.S. 863, 9 L.Ed.(2) 100 (1962). We are not persuaded that the establishment of a fait accompli by the purveyors of pornography is proof that they have already succeeded in destroying every remaining standard of our contemporary society. Nor has that society endowed these men with the right to establish our standards. License to continue does not follow each victory in spreading obscenity.[8] See *United States v. Oakley,* 290 F(2) 517, 519 (CA 6, 1961), *cert. den.* 368 U.S. 888, *rehearing den.* 368 U.S. 936.

In approving the rulings of the District Judge on appellant's use of expert testimony, we are not unmindful of the relevant observations of Justices Frankfurter and Harlan in their concurring opinions in *Smith v. California,* 361 U.S. 147, 164, 165, 172 (1959). We do not content ourselves by saying that those concurrences did not necessarily express the majority view, but are agreed that what the District Judge did in this case does

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[8]The proportions of these victories for pornography are illustrated by defendants' chief counsel's offer to put in evidence a miscellany of books which are "illustrative of literally thousands of like books which have been put on the market over the last three or four years; that these books have covers and blurbs which are sexually far more candid than any of the covers or blurbs involved in the case herein; that all of these books are distributed nationally, that is to say virtually in every state in the Union."

not offend the views of those distinguished Justices. We consider that their suggestions of a legitimate range of admissible expert testimony were satisfied by what the experts here were allowed to tell the jury.

2. Motion for Change of Venue.

Appellants moved, under Rule 21, Fed. R. Crim. P., to transfer the involved proceedings to California. The charged offenses encompassed the transportation of the allegedly obscene material from Fresno, California, appellants' base of operations, into four cities in Michigan, 18 U.S.C.A. §§ 1461, 1462. They complained of the hardships involved in standing trial so far from their homes, with the attendant expense of bringing witnesses and counsel to present their defense. The individual defendants averred that in California they had witnesses "who could testify to their reputation for truth and good moral character."[4] The motion was initially heard and denied by District Judge Raymond Starr whose opinion is reported as *United States v. West Coast News Company*, 30 F.R.D. 13, (W.D. Mich. 1962). We consider Judge Starr's opinion a quite adequate exposition of the rule that the involved motion was addressed to the discretion of the District Judge and a clear demonstration that his discretion was

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[4]The government's appendix includes the following recital of the content of the presentence report before the District Judge:

"The prior record of Aday . . . included a past state conviction for pimping and pandering. The pandering count involved 'the placing of a nineteen year old married woman and a mother, the wife of a serviceman, in a house of prostitution' and the pimping count involved taking prostitutes to labor camps where he would wait outside the bunkhouses and take the money from them as they emerged."

As to Maxey, the appendix avers that "The prior record of appellant Maxey * * * included a record of homosexuality and two arrests for soliciting and committing homosexual acts in public."

soundly exercised. It will appear that Judge Starr expressed a view that the "community standards" of *Roth* would in this case be those of jurors from the Michigan community. His opinion came down February 13, 1962, before *Manual Enterprises v. Day,* 370 U.S. 478, 488 on June 25, 1962, and *Jacobellis v. Ohio,* 378 U.S. 184, 193, 194, 195, on June 22, 1964, determined that the involved "community" was the entire nation. Following *Manual,* defendants renewed their motion for transfer of the trial to California, asserting the *Manual* destroyed the validity of the reasons given by Judge Starr in denying the motion. This renewed motion was also supported by new affidavits averring additional hardships in standing trial in Michigan. Judge Fox denied this second motion and this denial was not bottomed upon an erroneous view of the "community standards" that would apply. We assume that Judge Fox considered the entire thrust of appellants' motion and exercised his discretion by denying it. The indictment charged that crimes were committed in Michigan. Appellants had no constitutional right to be tried in their "home" state even though the crimes charged were committed there as well as in the State of Michigan where they chose to do business. *Platt v. Minnesota Mining Co.,* 376 U.S. 240, 245 (1964). We think that upon this appellate review, the question is "were these defendants deprived of a fair trial as a result of the denial?" *United States v. Aronson,* 319 F(2) 48, 52 (CA 2, 1963), *cert. den.* 375 U.S. 920, *rehearing den.* 375 U.S. 982. In our view, they were not. Whatever their early fears, they were able to provide an array of expert witnesses from California as well as Michigan and their defense was vigorously presented by them-

selves and California lawyers highly skilled in defense of obscenity cases, with the assistance of local counsel.

3. Presentation of the Accused Books to the Jury.

The government requested that the accused books be taken and read by the jury in the jury room. The defense requested that each book be read to the jury *viva voce* in open court. The District Judge ruled that the books be read individually by the jurors in open court with the judge, a court reporter and all counsel present. We find no fault with the plan adopted. The District Judge's reasons for such discretionary choice are adequately and well articulated in his opinion at 228 Supp. 175-179.

4. The District Judge's Instructions.

A specific criticism was the District Judge's refusal to tell the jury that in addition to proving that defendants knew the contents of the accused books, it was the government's burden to prove that the individual defendants also knew that such contents were in fact obscene. The Court refused to charge that: "If you believe that defendants were honestly ignorant of the 'obscenity' of the books, if you should find they were obscene, then the defendants should be acquitted." The Court did tell the jury:

> "Therefore, before you may convict, in addition to finding a book is obscene, you must find * * * as to each defendant that he knew the contents of the book and knowingly caused it to be mailed or so carried here."

and, further, that:

> "If a defendant was honestly mistaken as to the contents of any book or books, or if he had no

knowledge of the contents of any book or books, or if you have a reasonable doubt as to such defendant's knowledge of the contents of any book or books, then as to such defendant * * * you must find the defendant not guilty."

In the context of this case and our above expressed view of the obvious obscenity of *Sex Life of a Cop*, we find no reversible error in the Court's refusal of the proffered request. *Rosen v. United States*, 161 U.S. 29, 41-2 (1896); *Kahm v. United States*, 300 F(2) 78, 86 (CA 5, 1962), *cert. den.* 369 U.S. 859; *United States v. Oakley*, 290 F(2) 517, 519 (CA 6, 1961) *cert. den.* 368 U.S. 888, *rehearing den.* 368 U.S. 936. In *Rosen*, the Supreme Court said:

> "Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd and lascivious." 161 U.S. at page 42.

and the Court was thereby finding without error refusal to give a request substantially the same as the one here refused. Notwithstanding the expanding liberality that has followed *Rosen* the above quote was appended without criticism as footnote 28 to *Roth v. United States*, 354 U.S. 476, 491.

Appellants make numerous other charges of error in the instructions that the District Judge did give and in his refusal of others proffered by appellants. Appellants' counsel initially submitted ninety-nine requests to charge and at the end of the trial submitted twenty-nine more. Such inundation of a trial judge, with the obvious hope

that the created confusion will lead him to error, is questionable practice. *United States v. Olweiss,* 138 F(2) 798, 800 (CA 2, 1943); *Bateman v. United States,* 212 F(2) 61, 69 (CA 9, 1954).

We will not attempt detailed discussion of the District Judge's charge to the jury. Suffice it to say that his instructions followed the guidelines of *Roth* and *Jacobellis* and adequately presented the applicable rules of law. We find in it no errors or insufficiences that adversely affected any substantial rights of the appellants. Fed. R. Crim. P. Rule 52.

5. Challenge to Grand Jury Array.

Defendants were arraigned on March 2, 1962, and pleaded not guilty. On March 27, 1962, they moved to dismiss the indictment on the ground that the grand jury which had returned the indictment had been improperly composed. Such motion came a year and ten months after the indictment had been returned. Between then and the arraignment, extensive procedural steps had been taken by defendants. The District Judge conducted a hearing at which defendants presented evidence in support of the motion. He denied it on two grounds: first, that the motion was untimely and the objection had been waived and, second, that it was unmeritorious. His opinion on the matter is set out at 216 F. Supp. 911, 914-21 (D.C. W.D. Mich., 1963).

We consider that the District Judge correctly ruled that defendants' delay was, in the absence of excuse or explanation, sufficient to render the motion untimely. In *Scales v. United States,* 367 U.S. 203, 259, the Supreme Court affirmed the holding of the Fourth Circuit which, in *Scales v. United States,* 260 F(2) 21, 46 (1958)

had said, with reference to a ruling substantially like the one here,

> "The ruling was entirely justified under the terms of Rule 12 [F.R. Crim. P.] as interpreted by the authorities. The information on which the motion was based was at all times available to defendant and yet he failed to take action despite liberal extensions of time."

The Fourth Circuit there cited *Agnew v. United States*, 165 U.S. 36, 44 (1897), to support its ruling, as did the District Judge here.

The denial of the motion on its merits was also without fault. We need not detail what the evidence disclosed as to the method employed by the Western District of Michigan in obtaning names for jury service, other than to mention that the "Suggester" or "Key Man" system was used. No prejudice to defendants, or constitutional deprivation was disclosed by the evidence. See *United States v. Hoffa*, 349 F(2) 20, 29-30 (CA 6, 1965).

6. Constitutionality of Amended Statutes.

Appellants contend that 1958 amendments to §§ 1461, 1462 which permit prosecution at the place of delivery as well as at the point of origin, are unconstitutional. The writer expressed a contrary view in *United States v. Frew*, 187 F. Supp. 500, 507 (E.D. Mich. 1960). We find no constitutional fault in the statutes as amended. Appellants further suggest that in view of the decisions that have followed *Roth* and because of the replacement of some of the Justices who made up the majority in that case, *Roth* is of doubtful value as a precedent. Indeed, the American Civil Liberties Union, in its amicus

brief, intimates that we should now narrow the restrictions announced by *Roth*. ACLU says:

> "The teaching of *Roth* that material loses the protection of the Constitution if it can be called 'obscene' has bred more confusion than it has allayed."

and adds that the difficulty of obtaining an "authoritative consensus" from the Supreme Court in the cases that have followed *Roth* underlines, in the view of the ACLU, "the bankruptcy and inadequacy of the formulation in *Roth*."

We read all of this to mean that the time has now come to remove whatever restraints are still available to the government to impede the progress of the business we deal with. We have neither the right nor the inclination to seek a way around *Roth*.

7. Other Matters.

We have considered other contentions of appellants and find them without merit.

8. The Sentences.

Defendants, Aday, Maxey and West Coast News Company, Inc., were each found guilty under Counts 6, 10, 12, 13 and 14 of the indictment. The charge in Count 6 was the use of the *mails* to effect the carriage and delivery of copies of *Sex Life of a Cop* from Fresno, California, to Battle Creek, Michigan, on or about August 24, 1959, in violation of 18 U.S.C.A. § 1461. Counts 10, 12, 13 and 14 involved the use of a *common carrier* to effect like transportation to the Michigan cities of Kalamazoo, Grand Rapids, Kalamazoo and Muskegon on the respective dates of September 30, August 4, August 6, and August 4, 1959, all in violation of 18 U.S.C.A. § 1462. These statutes permit im-

position of a prison sentence of not more than five years and of a fine of not more than $5,000. Defendant Aday received the maximum under each count, five years imprisonment and a $5,000 fine, cumulated to a total of 25 years imprisonment and a fine of $25,000. Defendant Maxey received a prison sentence of five years on each of counts 6 and 10, two years on each of counts 12 and 13, and 1 year on count 14, cumulated to 15 years; he was fined $5,000 on each of counts 6 and 10, $2,000 on each of counts 12 and 13 and $5,000 on count 14, cumulated to a total of $19,000. The Corporation received the maximum fine of $5,000 on each of the five counts, cumulated to a total of $25,000. The prison sentences on Aday and Maxey were made subject to 18 U.S.C.A. § 4208(a)(2), with the specification that the prisoners would "become eligible for parole at such time as the Board of Parole may determine."

Appellants charge that because of their proximity in time and place the shipments constituted but one offense; that if the statutes can be construed to permit the consecutive sentences imposed here, such statutes and the sentences offend the United States Constitution's Eighth Amendment proscription of cruel and inhuman punishment.

We do not agree with the contention that the several shipments which violated § 1462 constituted but one offense. We do, however, express our view that less severe sentences would have been a more discreet exercise of the District Judge's authority. In *Beckett v. United States,* 84 F(2) 731, 732, 733 (CA 6, 1936) we adhered to the rule that appellate courts are generally "powerless to intervene" to change a District Judge's choice of sentence. Judge Simons there said "the dis-

cretion conferred by them [the statutes there involved] in respect to sentence is one vested in the sentencing judge and not in a reviewing court." He also considered that it was not illegal to impose consecutive sentences for offenses which might be viewed as components of a course of conduct, but of such practice he said, "caution and moderation must rule its exercise." We have adhered to the rule of *Beckett* in our later holdings. *Livers v. United States,* 185 F(2) 807 (CA 6, 1950); *Costner v. United States,* 271 F(2) 261 (CA 6, 1959); *United States v. McGuire,* 328 F(2) 303 (CA 6, 1964); *United States v. Gargano,* 338 F(2) 893 (CA 6, 1964). We have, as is true of other courts, often taken occasion to say that the discretion which we held belonged to the sentencing judge had not, in the case then before us, been abused.

In *Yates v. United States,* 356 U.S. 363, 367 (1958) and in *United States v. United Mine Workers,* 330 U.S. 258, 304 (1947), the Supreme Court reduced in the one a prison sentence, and in the other a fine. Both of these, however, involved punishment for criminal contempt. In *Brown v. United States,* 359 U.S. 41, 52 (1959) the Court indicated that the power there exercised was peculiar to contempt cases, saying,

> "Because there is no statutory limit upon a District Court's sentencing power in cases of criminal contempt, *Green v. United States,* 356 U.S. 165, this Court is not without power to review its exericse." *Cf. Yates v. United States,* 356 U.S. 365; *Nilva v. United States,* 352 U.S. 385, 386.

In its first remand of *Yates,* the Supreme Court expressed its view of the necessity "of having the trial judge reconsider the sentence *in the cool reflection of*

subsequent events." (Emphasis supplied.) *Yates v. United States,* 335 U.S. 66, 76 (1957). Perhaps the District Judge here may accept as a relevant "subsequent event" the thoughts we now express. The Seventh Circuit in its two decisions of *United States v. Wiley,* 267 F(2) 453 (1959) and *United States v. Wiley,* 278 F(2) 500 (1960), twice vacated an imposed prison sentence primarily because of its disapproval of a District Court practice of refusing to consider probation for an accused who stood trial rather than plead guilty. These cases can be read as holding that we have the power to set aside or reduce the severity of a sentence as an exercise of a federal appellate court's "supervisory power over the administration of justice of the lower courts." *Yates v. United States,* 356 U.S. 363, 366, 367. A distinguished member of the Tenth Circuit, albeit as a dissenter, would read the broad language of 18 U.S.C.A. Section 2106 as giving appellate courts the right to modify, by reduction, a District Court sentence. *Smith v. United States,* 273 F(2) 462, 468, 469 (CA 10, 1959). We have in mind, also, that all doubts as to appellate power in this regard may be shortly resolved if the Congress adopts presently proposed legislation which would provide federal appellate courts clear and broad powers in this field.

We applaud and share the desire of the learned District Judge in this case to strike at and slow down the ever-increasing velocity of today's commerce in obscenity. The characters of defendants Aday and Maxey as shown by their earlier criminal conduct give little support to a plea for moderation. It may indeed be that each of them has already "exhausted his balance with fate." On the other hand, while we think that the mailing which violated Section 1461 calls for separate punish-

ment, we are unable to avoid looking upon the offenses which violated Section 1462 as so similar in time and place that they would be adequately punished if the five year or lesser terms under these counts be made to run concurrently, but consecutive to the five year sentence under the Section 1461 count. Thus, neither defendant could receive any greater prison sentence than 10 years. We think, too, that it would be appropriate for the District Judge to continue his disparate treatment of the defendants by reducing the Maxey sentence under § 1462 to something less than that imposed upon Aday. We are not unmindful that 18 U.S.C.A. § 4208 (a) (2) would permit the parole authorities to shorten the time to be served under any sentence, but believe that the courts should, by their initial choice, fix its limits. We suggest no change in the fines imposed. It is a fair inference that the big business we deal with can well afford them.

Upon a mandate going down on the affirmance of the conviction of these defendants, it will be within the power of the District Judge under Rule 35 of the Federal Rules of Criminal Procedure to reduce the prison sentences imposed. He can do this *sua sponte* without command from us or motion by defendants. Because of this, we need not now announce whether we consider that the District Judge abused his discretion in imposing the involved sentences, whether we consider that today's law permits us to change such sentences, or whether we consider that the sentences imposed by the District Judge offend the Eighth Amendment proscription of cruel and inhuman punishment. There will be time enough for us to further consider the matter should the District Judge conclude not to adopt our suggestion as to reduction of the sentences.

This may indeed be a pragmatic handling of these difficult questions, and with great respect for the District Judge's earlier views, we hope that he will find it discreet to follow our thoughts, born of more opportunity for reflection than was available to him. This litigation has long pended and should be terminated.

We affirm the judgment of conviction and remand the cause to the District Court for its reconsideration of the prison sentences in the light of this opinion.

APPENDIX B.

Opinion of the Court of Appeals (Mandamus Proceedings.)

Sanford E. Aday, Wallace De Oretga Maxey, and West Coast News Company, Inc., a California corporation, Petitioners v. United States District Court for the Western District of Michigan, Southern Division, and Noel P. Fox, Judge of the United States District Court for the Western District of Michigan, Southern Division, Respondents.

No. 15381.
United States Court of Appeals
Sixth Circuit.
June 12, 1963.

Stanley Fleishman, Hollywood, Cal., for petitioners.

Herbert J. Miller, Jr., Asst. Atty. Gen., Criminal Div., Dept. of Justice, Washington, D. C., George E. Hill, U. S. Atty., Grand Rapids, Mich., for respondents.

Before Cecil, Chief Judge, and Weick and O'Sullivan, Circuit Judges.

Order.

This cause is before the Court on a petition by Sanford E. Aday, Wallace De Ortega Maxey, and the West Coast News Company, Inc., for a writ of mandamus against the United States District Court for the Western District of Michigan, Southern Division, and Noel P. Fox, District Judge. Petitioners have also submitted an application for a stay of further proceedings in the District Court for the Western District of Michigan pending determination of the petition for writ of mandamus.

The record discloses the following proceedings in the District Court: The petitioners were indicted on May 24, 1960, by a federal grand jury in the Western District of Michigan, for use of the mails for the delivery of obscene materials. Counts 1 through 6 of the indictment charged that the mails were used to deliver certain obscene, lewd and indecent books into the district, in violation of Sec. 1461, Title 18 U.S.C. Counts 7 through 19 charged that the defendants used a common carrier in interstate transportation to deliver certain obscene, lewd and indecent books into the district, in violation of Sec. 1462, Title 18 U.S.C.

On August 15, 1960, the defendants filed a motion pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, seeking to transfer this criminal proceeding from the Western District of Michigan to the Southern District of California. A hearing was held on the motion and arguments were presented by counsel. At the hearing Judge Starr ordered that any further motions were to be filed before September 30th. The defendants' motion to transfer the action to the Southern District of California was denied on February 13, 1962, by Judge Starr. (The opinion is reported at D.C., 30 F.R.D. 13.)

On March 2, 1962, the defendants were arraigned before Judge Starr. At that time Judge Starr granted thirty days in which to file any and all motions. On March 30, 1962, the defendants filed a motion to dismiss the indictment alleging that the grand jury was not legally constituted. A motion was also filed to dismiss the indictment because of an alleged unconstitutional application of the statutory law controlling the use of the mails. A motion for a bill of particulars was also filed at that time.

The United States filed on March 12, 1963, a motion to strike the motion to dismiss the indictment filed by the defendants which challenged the array of the grand jury. The government's motion asserted that the challenges to the array and the indictment were not *timely* made and, therefore, the defendants had waived their right to challenge the array of the grand jury.

On March 13, 14 and 15, 1963, a hearing was held before Judge Fox on the motion challenging the array of the grand jury. The District Court took testimony, oral and documentary, in support of the claim that the grand jury which returned the indictment was illegally constituted. This testimony was taken subject to the court's reservation of the *waiver* issue. At the conclusion of the hearing, the District Court allowed 45 days to file briefs on all issue involved in the different motions before the court.

On March 22, 1963, one week after the conclusion of the hearing on the motion challenging the array of the grand jury, Judge Fox called a pre-trial conference. He advised counsel that he was prepared to rule on all pending motions before the court. Accordingly, the 45-day period for filing briefs was rescinded. The court had, at that date, determined that the defendants had waived a challenge to the array of the grand jury. An order denying all motions was entered March 29, 1963.

Judge Fox's formal opinion denying all the defendants' motions was filed on April 18, 1963. The ruling that the defendants had waived their rights to challenge the array of the grand jury is the crux of this mandamus proceeding.

Judge Fox ruled that Judge Starr's announcement at the arraignment, granting 30 days in which to file all

motions, was directed to all pre-trial motions and not to all pre-arraignment motions. "Motions to the competency of the Grand Jury or to the sufficiency of the indictment or information, are prearraignment motions. Federal Rules of Criminal Procedure, Rule 12(b)(3)." Opinion reported at 216 F. Supp. 911.

"Defendants delayed filing the motion to dismiss the indictment on their challenge to the array until March 27, 1962, one year, ten months and three days after the return of the indictment against them * * *," id, 216 F.Supp. at 915. Relying on Agnew v. United States, 165 U.S. 36, 17 S.Ct. 235, 41 L. Ed. 624, Judge Fox determined that in the present case the defendants had "abundant opportunity to object to the competency of the Grand Jury before the indictment was found, and certainly much sooner than [they] did after indictment was returned," id., 216 F.Supp. at 916-917. "Neither Rule 6 nor Rule 12 of the Federal Rules of Criminal Procedure changes the intent and purpose of the rule of the Agnew case, excepting, however, the rules do give the court the power for *good cause shown*, to grant relief from a waiver," id., 216 F.Supp. at 917.

"Also, defendants' motion to transfer the case to the Southern District of California constitutes an implied waiver to any challenge to the array or the indictment," id., 216 F.Supp. at 918. "The whole thrust of the motion to transfer is that the indictment is good and defendants are ready to proceed to trial," id., 216 F.Supp. at 918.

"Thus, by every conceivable norm of judgment, both motions challenging the grand jury's competency and the indictment are untimely. An examination of the proceedings as a whole, to this point, clearly impresses

these motions with a badge of studied dilatory tactics," id., 216 F.Supp. at 920.

"For purposes of thoroughness, the court feels it proper to here state in its opinion that the attack on the array, on its merits, is not well taken. * * * and I find as a matter of fact that the defendants have failed to meet their burden of proof," id., 216 F. Supp. at 921.

The defendants had filed on December 3, 1962, a motion for renewal and reargument of the motion to transfer pursuant to Rule 21(b). On April 18, 1963, Judge Fox denied this motion in his "omnibus" opinion. Then on April 26, 1963, the petitioners filed in the United States Supreme Court, Miscellaneous Docket, No. 1426, a motion for leave to file a petition for writ of mandamus, and a petition for writ of mandamus, seeking to vacate the order of the District Court below which denied the transfer of proceedings to California. This mandamus proceeding is still pending in the Supreme Court. (This petition was denied June 17, 1963. See 373 U.S. ....., 83 S.Ct. 1921.)

On April 29, 1963, the petitioners filed a petition seeking a writ of mandamus in the Court of Appeals for the Sixth Circuit. This writ of mandamus is sought under the All Writs Statute, Sec. 1651 (a), Title 28 U.S.C., and Rule 29 of this Court. An accompanying brief in support of the petition for writ of mandamus was filed. The petition seeks to vacate the order of the District Court which struck the motion to dismiss the indictment, challenging the array of the grand jury. The petitioners also seek to have the order vacated which set the action for trial on June 17, 1963.

The petitioners claim that unless the trial is stayed they will be irreparably injured and deprived of their constitutional rights. Petitioners assert that the motions to dismiss the indictment were made diligently within the prescribed time limitations and in strict compliance with the Federal Rules of Criminal Procedure and by express leave of now Senior District Judge Starr. They claim that no challenge to the array before indictment is required under the present Rules of Criminal Procedure. They contend that the record shows that there was no express or implied waiver of the petitioners' objections to the indictment. Finally, they contend that the case on the merits of the grand jury array was not completed and, accordingly, the district judge was in error in ruling as he did.

On May 16, 1963, the petitioners moved in the District Court for an order staying the trial of the action. This motion was denied by Judge Fox on May 28, 1963. However, the trial was continued for one week, from June 17, 1963 to June 24, 1963.

On May 31, 1963, the defendants applied to this Court for a stay of the trial of this case scheduled to commence June 17, 1963, pending determination of the petition for writ of mandamus. (That date has been changed to June 24, 1963.) The grounds asserted in seeking the stay are: (1) the pending mandamus proceeding seeking transfer now pending before the United States Supreme Court; (2) the mandamus proceeding challenging array of the grand jury now before the Court of Appeals for the Sixth Circuit; (3) the petitioners will be irreparably injured and deprived of their constitutional rights unless the trial of the action is stayed; (4) the indictment does not inform the peti-

tioners as to what is the relevant community in determining whether the books are obscene. On June 10, 1963, the United States answered these contentions in a memorandum in opposition to the application for a stay of trial.

Mandamus is an extraordinary remedy. The issuance of a writ of mandamus against a judge is reserved for really extraordinary causes. Mandamus cannot be used as a substitute for appeal. Roche v. Evaporated Milk Association, 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185; Parr v. United States, 351 U.S. 513, 520-521, 76 S.Ct. 912, 100 L.Ed. 1377; Ex parte Fahey, 332 U.S. 258, 259-260, 67 S.Ct. 1558, 91 L.Ed. 2041; Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382-385, 74 S.Ct. 145, 98 L.Ed. 106; Beneke v. Weick, 275 F.2d 38, 39-40, C.A.6; Regec v. Thornton, 275 F. 2d 801, 802, C.A. 6; Massey-Harris-Ferguson v. Boyd, 242 F. 2d 800, 803, C.A. 6, cert. denied, 355 U.S. 806, 78 S.Ct. 48, 2 L.Ed. 2d 50.

This Court will not decide the questions involved at this juncture of the proceedings, nor grant an interlocutory appeal on the questions here presented in the petition for mandamus. There can be no appeal until there is a final adjudication of the case on its merits in the District Court. This case is not such as to require the use of the extraordinary writ of mandamus.

It is ordered that the petition for mandamus be and it is hereby dismissed and it is further ordered that the motion for stay of further proceedings be and it is hereby denied.

APPENDIX C.

Judgment of the Court of Appeals (West Coast News Company, Inc.)

United States Court of Appeals for the Sixth Circuit.

United States of America, Plaintiff-Appellee, vs. West Coast News Company, Inc., a California Corporation, Defendant-Appellant. No. 15,792.

Filed: March 22, 1966.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

JUDGMENT

Appeal from the United States District Court for the Western District of Michigan.

This Cause came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed and the cause remanded for further proceedings in conformity with the opinion.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ CARL W. REUSS.

APPENDIX D.

Judgment of the Court of Appeals (Maxey.)

United States Court of Appeals for the Sixth Circuit.

United States of America, Plaintiff-Appellee, vs. Wallace De Ortega Maxey, Defendant-Appellant. No. 15,793.

Filed: March 22, 1966.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

JUDGMENT

Appeal from the United States District Court for the Western District of Michigan.

This Cause came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed and the cause remanded for further proceedings in conformity with the opinion.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ CARL W. REUSS,
Clerk.

APPENDIX E.

Judgment of the Court of Appeals (Aday).

United States Court of Appeals for the Sixth Circuit.

United States of America, Plaintiff-Appellee, vs. Sanford E. Aday, Defendant-Appellant. No. 15,794.

Filed: March 22, 1966.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

JUDGMENT

Appeal from the United States District Court for the Western District of Michigan.

This Cause came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed and the cause remanded for further proceedings in conformity with the opinion.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ CARL W. REUSS,
Clerk.

APPENDIX F.

Judgment of the Court of Appeals (Aday).

United States Court of Appeals for the Sixth Circuit.

United States of America, Plaintiff-Appellee vs. Sanford E. Aday, Defendant-Appellant. No. 15-795.

Filed: March 22, 1966.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

JUDGMENT

Appeal from the United States District Court for the Western District of Michigan.

This Cause came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed and the cause remanded for further proceedings in conformity with the opinion.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ CARL W. REUSS,
Clerk.

APPENDIX G.

Order of Court of Appeals Authorizing Reduction of Sentences.

United States Court of Appeals for the Sixth Circuit.

United States of America, Plaintiff-Appellee, v. West Coast News Company, Inc. a California Corporation, Wallace DeOrtega Maxey, and Sanford E. Aday, Defendants-appellants. Nos. 15792, 93, 94, 95.

Filed: April 5, 1966.

Before Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

ORDER

It appearing that the District Court for the Western District of Michigan desires to reduce the sentences imposed in the above cases in the light of the opinion of this Court heretofore filed, and upon consideration.

It Is Ordered that the Clerk of this Court forthwith issue a mandate to the said District Court authorizing that Court to reduce the sentences imposed upon the above defendants and to certify his proceedings to this Court; and that the entry of this order shall constitute the mandate hereby ordered, and the Clerk of this Court shall forward a copy hereof to the said District Court.

Entered by order of the Court.

/s/ CARL W. REUSS,
Clerk.

APPENDIX H.

Order of District Court Reducing Sentences.

United States of America, in the District Court of the United States, for the Western District of Michigan, Southern Division.

United States of America, Plaintiff, v. West Coast News Company, Inc., a California corporation, Sanford E. Aday and Wallace de Ortega Maxey, Defendants. Criminal No. 6615.

Filed: April 6, 1966. (District Court)
Filed: April 11, 1966. (Court of Appeals)

ORDER

Pursuant to a session of said Court held in and for said District and Division, at the City of Grand Rapids, this 6th day of April, 1966.

Present: Honorable Noel P. Fox, District Judge.

Under Rule 35 of the Federal Rules of Criminal Procedure, this District Judge is authorized, *sua sponte*, to reduce the prison sentences imposed on defendants Sanford E. Aday and Wallace de Ortega Maxey on December 30, 1963, in the case of United States of America v. West Coast News Company, Inc., a California corporation, Sanford E. Aday, and Wallace de Ortega Maxey.

Rule 35 reactivates the District Judge's jurisdiction for this limited purpose, "* * * within 60 days after receipt by the court of a mandate issued upon affirmance of the appeal, * * *."

Having received a mandate and having fully considered the opinion of the Sixth Circuit Court of Appeals in the above-entitled case, it is the present judgment of this District Court Judge:

That the sentence heretofore imposed on Sanford E. Aday be, and hereby is amended by striking the statement in said sentence reading:

"The sentences imposed on Counts 6, 10, 12, 13 and 14 are to run consecutively and not concurrently," and substituting in its place the statement:

"The sentences imposed on Counts 10, 12, 13 and 14 are to run concurrently, but consecutively with that imposed on Count 6."

Thus, the net effect is to name a maximum sentence of ten (10) years, under the provisions of Section 4208(a)(2), known as the "indeterminate sentence."

The sentence heretofore imposed on Sanford E. Aday by this court, otherwise, and in every particular, remains in full force and effect.

As to defendant Wallace de Ortega Maxey, it is the judgment of this court that the sentence heretofore imposed on him, be and hereby is amended by striking the statement in said sentence which reads:

"The sentences imposed on Counts 6, 10, 12, 13 and 14 are to run consecutively and not concurrently,"

and substituting in its place the statement:

"The sentences imposed on Counts 6, 10, 12, 13 and 14 are to run concurrently."

Thus, the net effect is to name a maximum sentence of five (5) years, under the provisions of Section 4208(a)(2), known as the "indeterminate sentence."

The sentence heretofore imposed on Wallace de Ortega Maxey by this court, otherwise, and in every particular, remains in full force and effect.

Further, Rule 43 of the Federal Rules of Criminal Procedure provides: "The defendant's presence is not required at a reduction of sentence under Rule 35."

Therefore, defendants Sanford E. Aday and Wallace de Ortega Maxey are represented at this session of the District Court for the reduction of their sentences by their local attorney, George Cook.

By a document filed this day with the court, Sanford E. Aday and Stanley Fleishman, California general counsel for both defendants, have waived their appearance at these proceedings. This document further represents that Mr. Fleishman, acting as counsel for Wallace de Ortega Maxey, also waives Mr. Maxey's appearance.

It Is So Ordered.

/s/ NOEL P. FOX,
District Judge.

APPENDIX I.

Order of Court of Appeals Approving Reduction of Sentences and Affirming Judgments.

United States Court of Appeals for the Sixth Circuit.

United States of America, Plaintiff-appellee, v. West Coast News Company, Inc., a California Corporation, Wallace DeOrtega Maxey, and Sandford E. Aday, Defendants-appellants. Nos. 15792, 93, 94, 95.

Filed: April 21, 1966.

Before Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

ORDER

On March 22, 1966, this Court announced its opinion in this cause affirming the judgments of conviction, but remanding the cause to the District Court for its reconsideration of the prison sentences imposed upon defendants Aday and Maxey. Upon advice that the District Judge desired to reduce said prison sentences, this Court on April 5, 1966, issued its mandate returning the cause to the District Court for such purpose. The said District Court has now certified to this Court that the judgments heretofore entered in this cause have been amended so that as to defendant Aday,

> "The sentences imposed on Counts 10, 12, 13 and 14 are to run concurrently, but consecutively with that imposed on Count 6.
>
> "Thus, the net effect is to name a maximum sentence of ten (10) years, under the provisions of Section 4208(a)(2), known as the 'indeterminate sentence.'

"The sentence heretofore imposed on Sanford E. Aday by this court, otherwise, and in every particular, remains in full force and effect."

and as to defendant Maxey,

"The sentences imposed on Counts 6, 10, 12 13 and 14 are to run concurrently.

"Thus, the net effect is to name a maximum sentence of five (5) years, under the provisions of Section 4208(a)(2), known as the 'indeterminate sentence.'

"The sentence heretofore imposed on Wallace de Ortega Maxey by this court, otherwise, and in every particular, remains in full force and effect."

Now, Therefore, in Consideration Thereof It Is Ordered that the said reductions of sentences are approved and that the judgments in this cause, as so amended, are hereby affirmed.

Entered by order of the Court.

/s/ CARL W. REUSS,
Clerk.

APPENDIX J.

Constitutional Provisions, Statutes, and Rules Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

3. The provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

4. The provisions of the Eighth Amendment to the United States Constitution are:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5. The provisions of the Ninth Amendment to the United States Constiution are:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

6. The provisions of the Tenth Amendment to the United States Constitution are:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

7. The provisions of 18 U.S.C. 1461, as amended (June 25, 1948, c. 645, 62 Stat. 768; June 28, 1955, c. 190, §§ 1, 2, 69 Stat. 183; August 28, 1958, Pub. L. 85-796, §1, 72 Stat. 962), are:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and —

"Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

"Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom

any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

"Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing —

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction, thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination."

8. The provisions of 18 U.S.C. 1462, as amended (June 25, 1948, c. 645, 62 Stat. 758; May 27, 1950, c. 214, §1, 64 Stat. 194; August 28, 1958, Pub. L. 85-796, §2, 72 Stat. 962), are:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce —

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

"Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful —

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000, or imprisoned not more than ten years, or both, for each such offense thereafter."

9. The pertinent provisions of Rule 6 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., are:

"Rule 6. The Grand Jury

* * *

"(b) Objections to Grand Jury and to Grand Jurors.

(1) Challenges. The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the grounds that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment."

* * *

10. The pertinent provisions of Rule 12 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., are:

"Rule 12. Pleadings and Motions before Trial; Defenses and Objections

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the in-

formation, and the pleas of not guilty, guilty and *nolo contendere*. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) The Motion Raising Defenses and Objections. *(1) Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) Time of Making Motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) Hearing on Motion. A motion before trial raising defenses or objections shall be determined

before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct."

11. Rule 21 (b) of the Federal Rules of Criminal Procedure provides as follows:

* * * * *

"(b) Offense Committed in Two or More Districts or Divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill or particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

* * * * *

APPENDIX K.

Excerpts From Sex Life of a Cop.

The author states in *Sex Life of a Cop:*

"Sergeant Thorn joined his partner in the prowl car and soon they were patroling the dark deserted streets, Hal driving. Shaking doors and windows and checking the security of the business places in town was about the only minor police work the charming boys in blue cared to do. They had no desire to be energetic for a police department that was so corrupt in their opinions.

"It seemed the poor man paid through the nose and the rich man, or rich gangster, could get away with murder wholesale. If you gave the rich ones a ticket, the chief would tear it up and forget it. So why write tickets?

"If you arrested a poor man who couldn't fight it in the despicable courts, the district-attorney would throw the book at him. He would obtain another conviction to add to his list, and thus make himself look promising to the uninformed public for re-election. If you arrested a gangster or local big-shot the chief would turn him loose and chew the officer's ass out for bringing him in.

"The two officers had found, in the course of their police experience, that justice just didn't exist like everyone thought it did. It was just like meat bought at the grocery store—you bought fairness and justice by the pound. The more money one had the more justice he got. That was the way it was.

"They had seen men go to the penitentiary and county jail for long terms, because they didn't have the money to hire a lawyer to pull a fix or grease

the Judge's palm. The worst part was, the cases could have been beaten legally. But instead, the unfortunates were railroaded, thereby furthering another's evil gain. It wasn't this way just in Dobbsville. It existed all over the country in various parts. It was a well-known but unproven fact among the patrolmen that the Chief, Mayor, D.A., Judge, and the whole damnable bunch, was getting a pay-off, taking the age-old shakedown.

"But work didn't exist in Dobbsville, and a job was a job; so the officers resigned themselves to it. But they damn sure didn't have to break their backs butting their heads against a stone wall. They went by the old proverb, 'If you can't lick them, join them'.

"It wasn't until Jim became a cop that he began to realize how stupid John Public was, and how the wool was pulled over his eyes every day of the year. If old John only knew what his tax money bought. . . ." (pp. 71-72).

* * * * *

"All the way to Potter's residence, Frank Potter explained to the good Samaritan in very incoherent words that he knew he could buy off ALL the city officials plus the whole damn town. But if he got picked up tonight it would get in the newspaper, which he couldn't buy off. And tonight of all nights he couldn't afford it.

"He told briefly how he had a big business deal cooking with a firm that was backed by a large church organization from out of town. And just the slightest hint of scandal hitting the papers would kill it.

"Finally he added, just as they pulled into the driveway of his large beautiful home: 'I'd (hic) much rather pay you (hic) any day as those (hic) crooked goddamn city officials. Goddamn, I'm (hic) getting sick an' tired of keeping those (hic) sons (hic) o'bitches in spendin' money. The (hic) Chief, May'r an' all.'

"Minutes later a cab dropped a happy sergeant in front of the grocery store. He paid his fare hurriedly and walked behind the store to get his police car back in service.

"Starting the motor he let the radio warm up to check back into service. Then he drove back to the heart of town.

"Frank Potter was one hell of a fine fellow. He wished he could stop more people that felt the way he did, because burning a hole in his pocket was a crisp one hundred dollar bill. And in his mind was a dream of a new magnum revolver. Tomorrow he would buy it. And by trading in his old revolver he would have some money left to blow if he took the notion.

"This was one hundred dollar bill the crooked city officials wouldn't see, which was sure a hell of a shame. And he would explain the magnum to his dense partner by telling him that he had bought it on a credit plan." (p. 109).

* * * * *

"You can satisfy part of the people part of the time but you can't satisfy all the people any time. But to hell with all the fool people, Jim thought. If the people want their kids to be that way and don't want to believe the truth even when you draw them a picture of it then to hell with them all."

"The college professors, the guys who get paid for knowing nothing, said they didn't believe the incident happened even when the kids involved signed confessions for the sheriff admitting they did it." (pp. 114-115).

* * * * *

"Last week he had spent half his time in court, because a drunk man he and Hal had arrested out at Tresa's Club had tried to sue the city police for violating his civil rights. But all the guy managed to collect was six months in the county jail. To top it all, Tresa was a 'protected' madam, running a very successful whore house.

"Why people believe so entirely in civil rights when they are arrested, just because it's written in the books, was beyond him.

"Police can cover up very easily, — like for instance, holding a prisoner in what they call a hideaway jail, which is illegal as hell. But it works just the same.

"A hideaway jail is a jail like the others, all right. But the prisoner isn't listed on the station books, thus isolating him from all existence. This way the police can say they don't have the man, and hold him indefinitely without a charge. This makes it impossible for the man to have a lawyer or bail or any of his so-called civil rights.

"If the public would just see through this sort of thing, they could put a stop to it. But somehow they don't see through it. They are instead very content with television's glorification of police work." (pp. 115-116).

* * * * *

The book stresses the tensions which come from the incredible monotony and boredom of routine where one man is cooped up with another man day after day, hour after hour, doing routine things over and over.*

> "They were the first car in and Jim intended to be the first man to leave. Another goddamn night over, thank the Lord. And what a night it was. There were no reports to collect from the other cars as there had only been two calls all night, and his car had got them. He had made the reports on them: the kick-in at the market, and the disturbance call at the Kellogg home. That's the way it goes. Every night. Damn." (p. 35).

Part of the tensions of a police officer comes also from manifold fears — "the fear that he will get hurt to the point where he can't go on working, or the fear that he will be killed"; the fear of making "a wrong decision in a crucial moment, a life or death decision"; fear that "he'll show fear to some of his fellow officers". A police officer is "tormented by his fears, and he doesn't dare show them. He knows he's got to present a cool, calm front to the public."**

It is precisely these fears and ambivalent attitudes which are also emphasized in *Sex Life of a Cop*. The two police officers are relieved that they missed the shooting in connection with the robbery of a market (pp. 18-22) because "if we had drove in on that lot sooner, it would have been the end of two damn good police

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*Stern, "What Makes a Policeman Go Wrong," 53 *Journal of Criminal Law, Criminology and Police Science* (1962), 99. See also, Deutsch, *The Trouble With Cops* (1954), 75-95; Brannon, *The Crooked Cops* (1962).

**Stern, *Ibid.*, 99.

officers" (p. 23). There is the constant desire to get through with the "rat race" (p. 27).

Moreover, the book does not condone the conduct of the officers. There is disdain for "the charming boys in blue" (p. 71); there are ironic and amusing, sometimes bitter, scenes of rejection of the officers in their attempted advances (pp. 28-34, 60-67), and finally there is the retribution which comes to Sergeant Thorne in the knowledge that his wife has been unfaithful to him with his own fellow officer (pp. 144-147).

APPENDIX L.

Legal Proceedings Under Federal Obscenity Statutes Prior and Subsequent to 1958 Amendments.

On April 2, 1958, an indictment was returned against petitioner Aday, in the United States District Court for the Southern District of California, Northern Division (Fresno, No. 35-45-N.D. Crim.), charging him with violations of 18 U.S.C. 1461, by depositing for mailing certain alleged obscene books. This indictment was returned shortly before the amendment to 18 U.S.C. 1461, and was therefore brought in the district where the books were allegedly deposited.

The indictment was in four counts. The first count charged the depositing for mailing of the following books: *The Black Night* by Betty Short; *Rene* by Kip Madigan; *Stairways to Sin* by Kip Madigan; *Dark Quarters* by Stella Hampton; *The Rambling Maids* by Betty Short; *Tainted Wife* by Willi Peters and *Violent Surrender* by Cherri Southern. The jury returned a verdict of not guilty on the said first count, the prosecutor submitting only the book *The Rambling Maids* by Betty Short to the jury.

On the second count, the jury was 9-3 for acquittal on the book *The Strange Three* by Louise Sherman, another book *Karla* by Vern Wade having been withdrawn by the prosecutor.

On count three, the jury was 9-3 for acquittal on the book *Turbulent Daughters* by Reese Hayes.

The fourth count involved a book *Taxi Dancers*, but this count was withdrawn from the jury's consideration by the prosecutor.

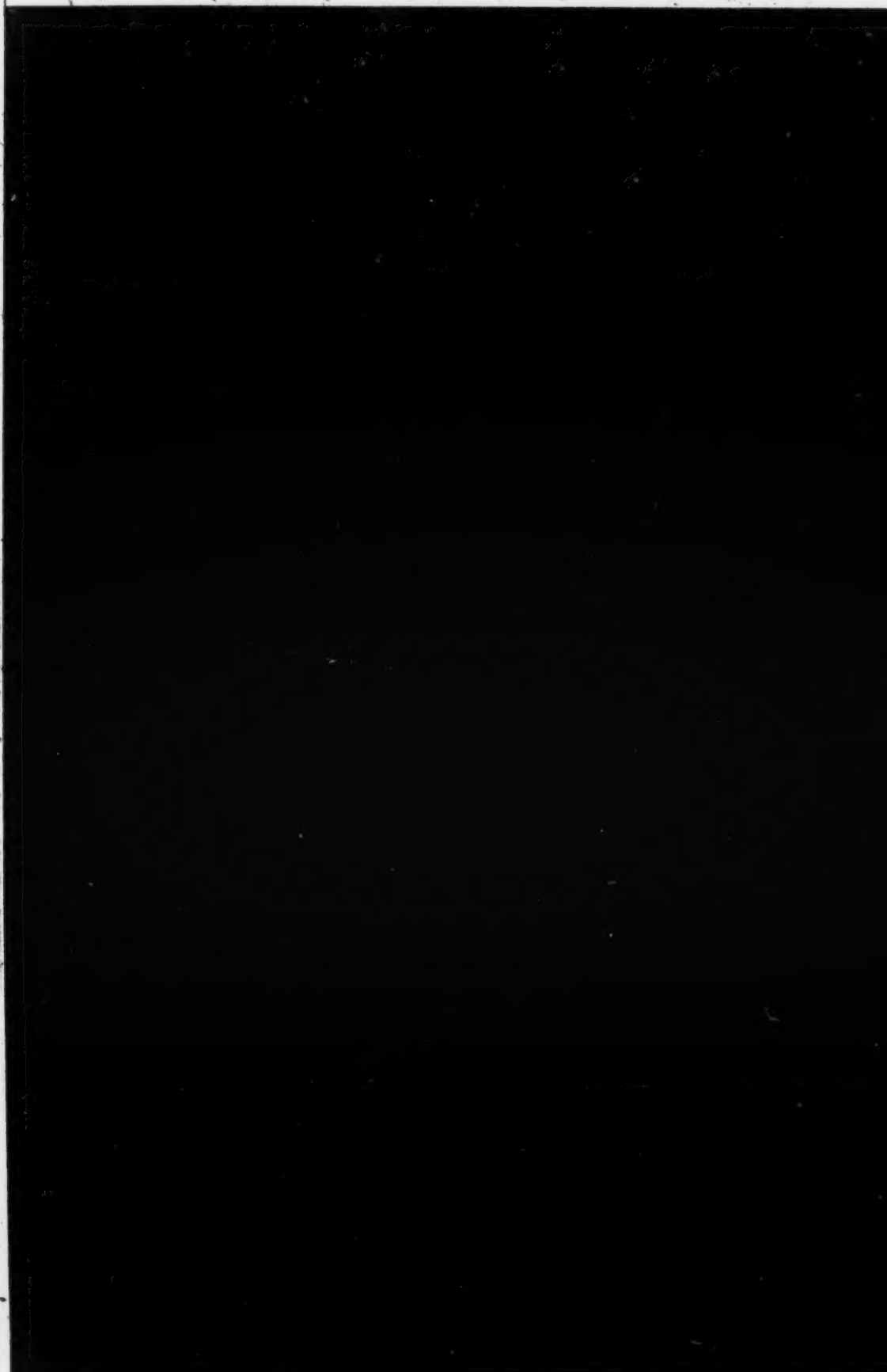
Thereafter, on February 6, 1959, the Government moved to dismiss counts two and three; the motion was granted, and the indictment finally dismissed therefore as to all counts on the said day by District Judge Yankwich.

Thereafter and despite the warnings by Congress and despite the alleged unofficial policy of the Department of Justice, an indictment in the District of Arizona (U.S.D.C. No. C-15596 Phoenix) was returned against petitioner Aday and other defendants on April 27, 1960, now charging that another alleged "obscene book" had been caused to be deposited in the City of Fresno, State of California, and caused to be delivered by petitioner and other defendants in the District of Arizona, in violation of 18 U.S.C. 1461. The book involved in said indictment was entitled *Sex Life of a Cop* by Oscar Peck.

On or about May 25, 1960, the Department of Justice picked Grand Rapids, Michigan for the return of still another indictment against petitioners, this time charging violations of 18 U.S.C. 1461 and 1462, as amended, involving eight alleged obscene books, one of which, *The Black Night* by Betty Short, had been vindicated in the trial in Fresno, California, and another, *Sex Life of a Cop,* was the very book named in the Arizona indictment as aforesaid.

On October 12, 1960, in Honolulu, Hawaii, petitioner Aday was indicted (U.S.D.C. for the District of Hawaii, Cr. No. 11510; for violation of 18 U.S.C. 1462, as amended, and of the three books there involved, the book *Sex Life of a Cop* was again charged as obscene, even though it was the subject of both the Arizona and Grand Rapids indictments as aforestated.

Only recently, in March 1965, petitioner Aday was again indicted and charged with violations of 18 U.S.C. 1461 and 1462, as amended. This time the indictment was laid in Houston, Texas (U.S.D.C. for the Southern District of Texas, Houston Division, Crim. No. 65-H-80).



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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 1329

SANFORD E. ADAY, WALLACE DE ORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC.,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondents.

BRIEF OF AMERICAN AND MICHIGAN CIVIL LIBERTIES UNIONS AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The filing of this brief *amici curiae* has been consented to by the Solicitor General.

INTEREST OF AMICI

The American Civil Liberties Union and its Michigan affiliate are dedicated to preserving and strengthening individual rights. We regard the broadest freedom of expression as indispensable to political debate, social commentary and artistic development as well as the basic values of a democracy. We filed a brief *amici curiae* in the court below supporting reversal of appellants' convictions because, while "Sex Life of a Cop" may not qualify as enduring literature, we firmly believe it is "speech" and entitled to the protection of the First Amendment. We file the present brief because we believe the case presents important First Amendment questions which this Court should answer.

ADDITIONAL REASONS FOR GRANTING THE WRIT

We urge the reasons advanced in the petition for certiorari and, in addition, the following:

1. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE TO CONSIDER AND DECIDE WHETHER TO CONTINUE ITS PRESENT OBSCENITY PER SE APPROACH TO EXPRESSION DEALING WITH SEX OR CHANGE TO ONE THAT CAN BE APPLIED TO ALL EXPRESSION, REGARDLESS OF SUBJECT MATTER.

While we urge the court to abandon the *Jacobellis*[1] test, we state unhesitatingly that it is an improvement on *Roth*,[2]

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[1] *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

[2] *Roth v. United States*, 354 U.S. 476 (1957).

which was, in turn, an improvement on the earlier test, *Regina v. Hicklin*, [1868] LR 3 Q.B. 360. The merit of *Jacobellis* is that it allows for the preservation of works which, though prurient in appeal and excessive in candor, nevertheless are not utterly without redeeming social importance. *Jacobellis* acknowledges that certain works dealing with sex offend the sensibilities of some and that there is a possibility that they may have some kind of deleterious effect on certain types of personalities. But it asserts that these interests, though they exist, are not weighty enough to justify suppressing a work if it offers society anything at all of importance. In short, *Jacobellis* reaffirms the principle that freedom of expression is one of the most important values in a democracy, and therefore worth taking some risks for.

But regardless of its merit, *Jacobellis* is a *per se* test. It is based on the proposition that obscenity is not "speech," and so asks only—is the work obscene? If it is, it is without the protection of the First Amendment, under *Jacobellis*. In *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), the Court cast off the *per se* approach to expression dealing with reputation and indicated that it cannot be applied without risk to *any* area of expression:

> "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, *obscenity* [citing *Roth*], solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no *talismanic* immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (Emphasis added.)

Nevertheless, in *Memoirs of a Woman of Pleasure v. Massachusetts*,[3] *Ginsberg v. United States*,[4] and *Mishkin v. New York*[5] the Court again posed as the determinative question—Is it obscene?

We are opposed to the application of different tests to different expression, depending upon its subject matter, and favor the fashioning of one test that can be applied to all expression regardless of what it is about, i.e., government, race, war, sex, religion, etc. See, e.g., Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963). We urge the Court to grant certiorari in this case so that such a test can be fashioned.

2. EVEN IF THE OBSCENITY PER SE TEST IS TO BE RETAINED, THE COURT SHOULD GRANT CERTIORARI IN THIS CASE BECAUSE IT INVOLVES A BOOK OF THE TYPE THE COURT HAS NOT DEALT WITH AND WHICH PROBABLY CONSTITUTES A MAJORITY OF THOSE CONSIDERED OBJECTIONABLE, I.E., "DIRTY" PAPERBACK NOVELS WHICH ARE NOT, HOWEVER, HARD CORE PORNOGRAPHY.

The Court has dealt with obscene letters,[6] lewd photographs of actresses,[7] a tabloid featuring photographs of women,[8] a newspaper article containing coarse and vulgar language,[9] newspaper advertisements,[10] news magazines

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[3] — U.S. —, 16 L. ed. 2d 1 (1966).

[4] — U.S. —, 16 L. ed. 2d 31 (1966).

[5] — U.S. —, 16 L. ed. 2d 56 (1966).

[6] E. g., *United States v. Chase*, 135 U.S. 255 (1890).

[7] *Grimm v. United States*, 156 U.S. 604 (1895).

[8] *Rosen v. United States*, 161 U.S. 29 (1896).

[9] *Swearingen v. United States*, 161 U.S. 446 (1896).

[10] *Dunlop v. United States*, 165 U.S. 486 (1897).

featuring sex crimes,[11] girly magazines,[12] homosexual magazines,[13] nudist magazines,[14] motion pictures,[15] novels of masochism and sadism,[16] digests of psychiatric studies of sex,[17] a psychosexual biography,[18] essays on love, sex, and sexual relations,[19] and an eighteenth century pornographic novel.[20] It has not, however, dealt with a book like "Sex Life of a Cop."

The book is a paperback novel dealing with two young police officers who become disillusioned with their official duties and fall victims to the many sexual temptations that are tendered them by a broad spectrum of the city's womanhood. While a great volume and variety of sexual activity is described, the language employed is not obscene. All the sexual activity is heterosexual and there is no sadism, masochism, etc. The work is what is commonly called a "dirty book," but not hard core pornography.[21] We submit that it is not obscene under *Jacobellis*.

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[11] *Winters v. New York*, 333 U.S. 507 (1948).

[12] *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1945).

[13] E. g., *Manual Enterprises v. Day*, 370 U.S. 478 (1962).

[14] E. g., *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958).

[15] E. g., *Burstyn v. Wilson*, 343 U.S. 495 (1952).

[16] *Mishkin v. New York*, — U.S. —, 16 L. ed. 2d 56 (1966).

[17] *Ginsberg v. United States*, — U.S. —, 16 L. ed. 2d 31 (1966) ("Liaison").

[18] Id. ("The Housewife's Handbook").

[19] Id. (EROS).

[20] *Memoirs of a Woman of Pleasure v. Massachusetts*, — U.S. —, 16 L. ed. 2d 1 (1966).

[21] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (Justice Stewart, concurring).

Books of this type can be found on drug store paperback racks in cities, towns, and villages across the country. If we are to continue with the obscenity *per se* approach—or, indeed, regardless of what approach is used—the question of whether or not such books are protected as "speech" should be decided.

CONCLUSION

For the foregoing reasons, as well as those advanced by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Submitted upon consent of the parties)

IN THE

Supreme Court of the United States

October Term, 1966

No. 149

SANFORD E. ADAY, WALLACE DeORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND UPON THE MERITS.

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Interest of American Book Publishers Council, Inc.

American Book Publishers Council, Inc., of 1 Park Avenue, New York City, is a membership corporation composed of most of the leading publishers of books of general circulation, including many university presses. It is estimated that the 188 members of the Council publish and distribute over 85% of all general books in the United States. None of the petitioners is a member of the Council.

The Council is deeply interested in safeguarding freedom of the press as guaranteed by the First and Fourteenth Amendments to the Constitution. It sought leave to and did obtain consent of the parties to file this brief,

because it feels that the substantive and evidentiary standards applied by the District Court below improperly deviated from constitutional requirements. The Council, as a matter of policy, takes no position with respect to the obscenity *vel non* of any publication and, therefore, this brief will not address itself to the character of the book involved herein.

ARGUMENT

POINT I

The District Court improperly refused to instruct the jury that the challenged books could not be found obscene unless utterly without redeeming social importance.

On March 21, 1966, Mr. Justice Brennan in delivering this Court's judgment in *A Book named "John Cleland's Memoirs of a Woman of Pleasure" et al.* v. *Attorney General of the Commonwealth of Massachusetts* U. S. , 16 L ed 2d 1 (1966), wrote an opinion joined in by Chief Justice Warren and Mr. Justice Fortas, stating that total absence of redeeming social importance is an essential element of obscenity:

> "A book can not be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite purient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness." (p. 6)

This position has consistently been advanced by various members of the Court since *Roth* v. *United States*, 354 U. S. 476 (1957). Indeed, we believe that a majority of the members of the present Court adheres to this view and has so indicated either through opinions of the Court or in separate opinions.

Nevertheless, the District Court refused to instruct the jury as requested by defendants' counsel that "A writing may not be deemed obscene unless it is utterly without redeeming social importance * * *" (664a, P. I. 103). We submit that such refusal on the part of the trial judge constitutes reversible error.

POINT II

The District Court should have granted defendants' request to read the challenged books aloud to the jury.

Defendants' counsel requested that the challenged books, which had been admitted in evidence as exhibits—and as the Court said, "were before the jury"—be read aloud in the courtroom. This request was rejected; instead, the Court directed that the books be presented to the jury for reading in the courtroom at the close of the Government's case. 228 F. Supp. 171, 179 (1964). The Court noted that reading the books aloud would (i) cause embarrassment to the females on the jury and in the courtroom, (ii) require considerable time, (iii) would be inconsistent with the nature of the books since they were not intended to be read aloud and (iv) would not permit as fair an accommodation to slow readers as the method directed (p. 178).

We submit that the trial court's reasons for denying defendants' request for oral reading of the challenged books were unconvincing and, at any rate, insufficient to justify its abandonment of the normal procedure for the presentation of documentary evidence to a jury. Particularly in First Amendment criminal cases, a court should take special care to insure, insofar as possible, that evidence is presented in a manner which is fair to a defendant.

We submit that if a book is read to a jury there is greater likelihood that the individual jurors will pay attention to its contents and consider such contents as a whole, as required by *Roth* v. *United States, supra.* If merely copies of the book are furnished to the jurors, there is a strong possibility that they will pay less attention, focus on particular items (such as covers and blurbs) and otherwise fail to evaluate the work as a whole. In the ordinary trial it is basic that exhibits may be read to the jury. *A fortiori,* in order to safeguard First Amendment rights, we urge that no short cuts be indulged in, but that this Court require trial courts in obscenity cases to honor the requests of either the prosecution or the defense to read the challenged material to the jury.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1966

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SANFORD E. ADAY, WALLACE DEORTEGA MAXEY AND WEST COAST NEWS COMPANY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners in this obscenity prosecution requested that the trial court, as part of its definition of what materials are "obscene," instruct the jury as follows (Pet. 16; Appendix to Appellants' Brief in the court of appeals, Vol. IV, p. 664a):

> A writing may not be deemed obscene unless it is utterly without redeeming social importance. In other words, the Constitution protects all material relating to sex except that which is totally devoid of social importance. The word 'redeeming' in the context herein refers not to a balancing of the alleged pruriency against the social importance of the ma-

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terial, but rather to the presence of matters of social importance in the content which gains for the material its position as constitutionally protected utterance. The jury will therefore keep in mind that in addition to the standards for judging obscenity, heretofore defined, no writing can be found to be obscene unless the writing is also utterly without redeeming social importance as the Court has defined it.

The trial court declined to give this instruction, deeming it "an incorrect statement of the law as to elements of the offense." In the court's view, the lack of redeeming social importance "is not an element of the definition [of obscenity] itself" or "an essential element of obscenity" but merely "a consequence of obscenity * * *." (*id.* Vol. III, p. 535a). The court went on to instruct the jury that the definition of "obscenity" had but two elements, "predominant appeal to prurient interest" and "if it goes substantially beyond customary limits of candor in description or representation on such matters" (*id.* Vol. III, p. 560a). Petitioners thereafter objected to this instruction for failure to include, as "one of the essential ingredients of the concept of obscenity," that the material be "utterly without redeeming social importance." (*id.* Vol. III, p. 567a).

The district court's instructions were in keeping with the language of *Roth* v. *United States*, 354 U.S. 476, and the opinion of Mr. Justice Harlan in *Manual Enterprises* v. *Day*, 370 U.S. 478.[1] However, in *Memoirs* v. *Massachusetts*, 383 U.S. 413, decided after

[1] *Jacobellis* v. *Ohio*, 378 U.S. 184, was decided after the trial below.

the trial in this case and one day before the decision of court of appeals affirming the convictions, the Court reversed a holding of the Supreme Judicial Court of Massachusetts which had rejected the proposition "that a book which appeals to prurient interest and is patently offensive must [also] be unqualifiedly worthless before it can be deemed obscene." In an opinion announcing the judgment of the Court, in which the Chief Justice and Mr. Justice Fortas joined, Mr. Justice Brennan stated (338 U.S. at 419–420):

> The Supreme Judicial Court erred in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene." A book cannot be proscribed unless it is found to be *utterly* without redeeming social value [emphasis in original]. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness. Hence, even on the view of the court below that *Memoirs* possessed only a modicum of social value, its judgment must be reversed as being founded on an erroneous interpretation of a federal constitutional standard.

It is clear that under this test, as further explicated in Part II of the opinion, an issue whether material has redeeming social value and was traded on the basis of that value is an important one in a prosecution of a defendant charged with the distribution of the material as obscenity. Viewed in conjunction with the opinions of the other members of the Court, these principles of

the plurality opinion would, we assume, govern any case prosecuted after the date of that decision.[2]

The opinion of the court of appeals, which was apparently written prior to the decision in *Memoirs* v. *Massachusetts* (although released on the day following), fails to consider the claim that the instructions to the jury were fatally defective under the standard enunciated in that case. Since this fundamental question has not been resolved by the court of appeals, we suggest that the appropriate disposition of the petition would be to remand the case to the court below for further consideration in the light of *Memoirs* v. *Massachusetts*.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

SEPTEMBER 1966.

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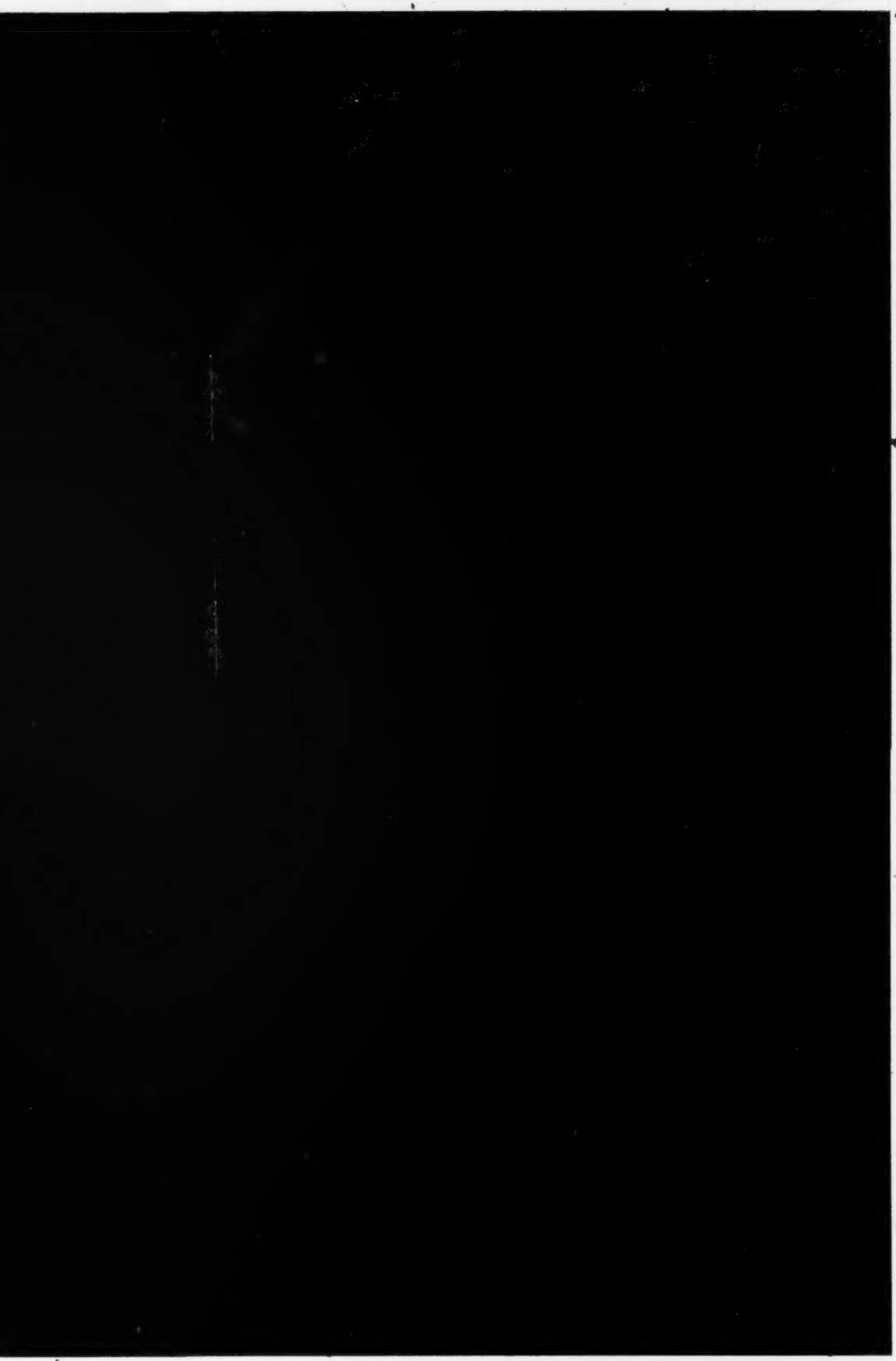
[2] Under the rule articulated in *Ginzburg* v. *United States*, 383 U.S. 463, petitioners might have been found guilty, even had the jury found that the works themselves—viewed in the abstract—had redeeming importance, if the jury also found that the accused publications were "originated or sold as stock in trade of the sordid business of pandering * * *" (383 U.S. at 467). Such an instruction, however, was not given.

U.S. GOVERNMENT PRINTING OFFICE: 1966



IN THE

Supreme Court of the United States

October Term, 1966
No. 149

SANFORD E. ADAY, WALLACE DEORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioners' Reply to the Memorandum for the United States.

The Solicitor General on behalf of the United States has suggested to the Court that the appropriate disposition of the Petition for a Writ of Certiorari herein is a remand to the court below. The basis of this suggestion is a concession by the Solicitor General that the trial court erred in failing to give an instruction requested by the petitioners, and it is requested by the Solicitor General that the court below be given an opportunity to resolve this limited question.

The petitioners respectfully request that a different disposition be made. The petitioners request that the Petition for a Writ of Certiorari herein be granted and

that, after hearing, the judgments of conviction be reversed with directions to dismiss the indictment. This request is made on behalf of petitioners in the interest of justice and to insure a fair administration of criminal justice in the courts of the United States.

In particular, the petitioners allege as follows:

1. The indictment against these California residents was returned in Grand Rapids, Michigan on March 24, 1960 (1a). Without fault of the petitioners, the case herein is now some six years old, and the financial burdens placed on petitioners as a result of the trial of this case has been so great and so onerous as to virtually put them out of business. An existing order restrains the corporate petitioner from making any transfer or disbursements of its assets, except necessary disbursements to enable the corporation to carry on its day-to-day business until the final judgment is entered "and satisfied" in the action. The individual petitioners are restrained from making any transfer or disbursements of their assets, except as necessary for living expenses, until such time as a final judgment is similarly entered and satisfied (769a-770a). Bail for the petitioners in this case was fixed at $85,000 (606a-607a), and has been furnished.

By the request for a limited remand, the Solicitor General is seeking to preserve intact all the rulings of the trial court and the Court of Appeals, except for the one conceded erroneous ruling made on one specific request by petitioners for an instruction with respect to "redeeming social value". *United States v. West Coast News Co., Inc., et al.*, 216 Fed. Supp. 911, 228 Fed. Supp. 171, 30 F.R.D. 13, 357 F. 2d 855; Appendix A to Petition. The principles enunciated by the trial court

and the court below have been accepted as governing law by other courts in other jurisdictions. *United States v. Luros, et al.*, 243 Fed. Supp. 160, 176 (D.C. Iowa 1965); *United States v. Jessup*, 38 F.R.D. 42, 44 (D.C. Tenn. 1965).[1]

Although the court below had the benefit of this Court's decision in *Jacobellis v. Ohio*, 378 U.S. 184 (Appx. A to Pet. p. 14), the court below found no error in any instructions given or refused by the trial court. On limited remand, there will therefore be only two possibilities: (1) that the court below will reaffirm its position and the petitioners will be again compelled to make application to this Court for review; or (2) the court below will reverse the judgments of conviction and order a new trial in Grand Rapids, Michigan for these petitioners. The result can only be additional financial and physical burdens upon petitioners, which burdens petitioners are no longer in a position to assume. The second trial would be governed by the rules of law enunciated by the court below which resulted in the affirmance of judgments of conviction wherein

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[1]In *United States v. Hamling, et al.*, United States District Court for the Southern District of Texas, Houston Division, C.R. 65-H-172, unreported, another federal prosecution instituted by the Government under the multiple venue provisions of the federal obscenity statutes in Houston, Texas against California and Ohio residents, District Judge Joe Ingraham, made the folownig statement:

> "Now, I want to make this announcement, that I intend to try this case on the pattern of the Aday case in the Sixth Circuit, which was affirmed by the Sixth Circuit, and to the extent that it is applicable in this case, I expect to charge the jury in much the same manner, so, if that is any assistance to Counsel on either side of the table, we have to proceed in one way or another, and that is a case that I expect to follow."
>
> (Reporter's Daily Transcrpit of Proceedings [8/2/66], pp. 964-965).

sentences of twenty-five years and nineteen years imprisonment, subsequently reduced to ten years and five years imprisonment, were imposed.

The other questions presented in the Petition which the Government seeks to leave undisturbed are questions of substantial importance which should be decided by this Court since, if permitted to remand undisturbed, they will not only make any subsequent trial fundamentally unfair and violative of due process, but they will also seriously affect other trials which have taken place, or which the Government contemplates instituting under the multiple venue provisions of the federal obscenity statutes. Petitioners turn, therefore, to a very brief discussion of some of the significant questions that are presented on this Petition for a Writ of Certiorari.

2. One of the questions presented on this Petition is, whether the federal obscenity statutes, 18 U.S.C. 1461 and 1462, as amended by Congress in 1958 permitting the Government a multiple choice of venue in prosecutions involving the mailing and shipment of books and other media of communication, on their face and as construed and applied, violate the free speech and press, the due process and fair trial provisions of the First, Fifth and Sixth Amendments (Ques. 5, Pet. p. 7).

In denying a Petition for Stay pending appeal in the case of *Reed Enterprises, et al. v. Katzenbach, et al.*, United States District Court for the District of Columbia, Civil No. 1744-65, Justice Black stated:

> "As shown by the Court of Appeals opinion in Reed Enterprises v. Corcoran, 354 Fed. 2nd 519, this proceeding involves serious constitutional questions concerning multiple prosecutions in many ju-

risdictions. I am denying the stay here however, solely because of the Solicitor General's statement that no other prosecutions are intended to be brought anywhere based on the materials here involved — Petition denied."

(Letter from Office of the Clerk of the Supreme Court of the United States dated June 30, 1966.)

In *Reed Enterprises v. Corcoran,* 354 F. 2d 519, 522 (D.C. Cir. 1965), Circuit Judge J. Skelly Wright made the following statement:

"While we do not, of course, intimate any opinion as to the constitutionality of the 1958 amendment, an attack on a statute which would permit the prosecution a multiple choice of venue in this protected area of First Amendment freedoms is not patently frivolous. Such choice could induce the publisher to engage in self-censorship and thus restrict the public's access to protected publications. 'Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.' Dombrowski v. Pfister, 380 U.S. 479, 494, 85 S.Ct. 1116, 1125, 14 L.Ed.2d 22 (1965).

"We find that the complaints filed in the District Court raise a substantial question as to the constitutionality of the 1958 amendment."

Thus, it is plain, it is submitted, that the question of the constitutionality of the federal obscenity statutes, as amended, is a question of great substantial importance which should be decided by this Court and which clearly will not be satisfactorily resolved in any subse-

quent re-trial herein if this Court does not make a final ruling. See, Petition, pages 43-46. See also, Appendix L to Petition, pages 52-54, wherein the legal proceedings instituted against petitioner Aday in Fresno, California; Phoenix, Arizona; Honolulu, Hawaii, and Houston, Texas (in March, 1965) are discussed.

3. Another question presented in the case herein of substantial importance in all federal obscenity prosecutions, including the one herein, is whether the judgment of conviction can stand in the light of the due process and free speech provisions of the First, Fifth and Sixth Amendments where no evidence, other than the book itself, was offered by the prosecution to establish the alleged obscenity of the book (Ques. 2, Pet. p. 6).

Involved in this question is the right to fair notice and hearing, the right of confrontation and the assistance of counsel, as well as the basic question, whether speech and press may be made criminal without proof of the essential elements purportedly constituting criminal speech. Unless the issue discussed and determined in *United States v. Klaw,* 350 F. 2d 155 (2 Cir. 1965), is finally resolved by this Court, courts and juries sitting in federal obscenity trials will be sitting as censorial groups and subjecting books and other media of communication to arbitrary and discriminatory suppression.

The petitioners submit that the motions they made for judgments of acquittal should have been granted because of a complete failure of proof by the prosecution. See, *Yates v. United States,* 354 U.S. 298, 327-331.[2]

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[2]The Memorandum of the United States, at page 4, footnote 2, suggests that petitioners might have been found guilty under the rule enunciated in *Ginsburg v. United States*, 383 U.S. 463, if the jury found that the accused publications originated in "the sordid business of pandering". It is stated that an instruction to this

4. Another substantial question presented in the Petition is the question of the trial court's instructions and refusals to instruct, approved by the court below, on the issue of scienter (Ques. 1, Pet. pp. 4-5). The trial court instructed the jury that the Government was required to prove only that each of the petitioners "knew the contents of the book"; refused to instruct the jury that the Government was required to prove that each of the petitioners knew that the book was obscene, and refused to instruct the jury that if the jury found that petitioners were honestly ignorant of the alleged obscenity of the book then petitioners were entitled to an acquittal.

The court below held that the aforesaid instructions and refusals to instruct were clearly correct and constitutionally permissible (Appx. A to Pet. pp. 12-13). Based upon said decision of the Court of Appeals, District Court Judges in Sioux City, Iowa and Houston, Texas have similarly instructed the juries in multiple venue prosecutions under the federal obscenity statutes. *United States v. Luros, et al.*, United States District Court for the Northern District of Iowa, Western Division, 65-C.R.-3007-W; *United States v. Hamling, et al.*, United States District Court for the Southern District of Texas, Houston Division, C.R. 65-H-172.

That this question is one of great constitutional importance is attested to by the grant of certiorari in *Redrup v. New York*, October Term 1966, No. 3; and

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effect was not given. However, the record is barren of any evidence of "pandering" in the production, sale or publicity relative to the book herein. Thus, although no evidence was presented at the trial to prove "obscenity" or "pandering", the Government would now subject petitioners to further jeopardy even if judgments of acquittal should properly have been granted. This clearly raises a substantial question which should be decided by this Court.

Austin v. Kentucky, October Term 1966, No. 16, now set for argument before this Court on October 10, 1966. See also, *Mishkin v. New York,* 383 U.S. 502. The elimination of a requirement of guilty knowledge in federal obscenity prosecutions, it is submitted, renders 18 U.S.C. 1461 and 1462, as amended, vague, ambiguous and violative of the free speech and press and due process provisions of the First and Fifth Amendments. See, Petition, pages 24-28. It is submitted that all federal courts, including the courts below, should receive the guidance of this Court on this fundamental question before any further prosecutions under the federal obscenity statutes are conducted. Without a definitive ruling from this Court, constitutional infirmities will infect future proceedings to the detriment of both the Government and the accused alike.

5. The Petition for a Writ of Certiorari also presents the question, whether the book *Sex Life of a Cop* by Oscar Peck is entitled to the protections of the free speech and press provisions of the First Amendment (Ques. 4, Pet. p. 7). For the dissemination of this single book, it should be noted that petitioner Aday was sentenced in the trial court to twenty-five years imprisonment, later reduced to ten years, and a fine of $25,000. The petitioner Maxey was sentenced in the trial court to fifteen years imprisonment, later reduced to five years, and a fine of $19,000. The corporate defendant was fined the sum of $25,000.

The petitioners submit that the book *Sex Life of a Cop* has ideas of social importance; does not exceed contemporary standards in the depiction of sex; and does not appeal to a shameful or morbid interest in sex. Measured by the constitutional standards for judging

obscenity as enunciated and applied by this Court, petitioners submit that said book is not obscene and is entitled to the protections of the First Amendment (Pet. pp. 40-42). If the holding of the court below is permitted to stand, the book will be used, and is being used, as a standard for judging the obscenity of other writings. Such use in the various multiple venue prosecutions, or in state courts, may have serious consequences for writings and material ordinarily entitled to constitutional protection. It is important that this Court make clear to law enforcement agencies that the standards for judging obscenity are strict and cannot be misapplied so as to suppress expression entitled to First Amendment protection.

Petitioners do not further detail the remaining substantial questions involved in the case herein. Among such substantial questions are: whether the federal obscenity statutes authorize convictions for the dissemination of a "filthy" book as well as an "obscene" book (Ques. 1, Pet. pp. 5, 29-31); whether the wholesale exclusion by the trial court of oral and documentary testimony offered by petitioners to establish the nonobscenity of the book and the absence of unlawful knowledge and intent on the part of petitioners arbitrarily deprived petitioners of a fair trial and due process of law (Ques. 3, Pet. pp. 6-7, 36-40); whether the denial of petitioners' motion for a transfer of proceedings deprived petitioners of a fair trial and their liberties and property without due process of law (Ques. 6, Pet. pp. 7, 46-47); whether the trial court unlawfully struck petitioners' motion to dismiss the indictment based on the illegal selection and organization of the Grand Jury which returned the indictment (Ques. 8, Pet. pp. 8, 48-

49); whether petitioners were denied a public trial in violation of the due process and free speech and press provisions of the First and Sixth Amemdments (Ques. 7, Pet. pp. 8, 47-48); whether the consecutive sentences of imprisonment and fines imposed upon petitioners were contrary to law and the due process and free speech provisions of the Constitution (Ques. 9, Pet. pp. 8, 49-51); and whether the sentences of fines and imprisonment imposed upon petitioners, the orders of sequestration and the imposition of bail herein constituted cruel and unusual punishment and the imposition of excessive bail in violation of the First, Fifth, Sixth and Eighth Amendments (Ques. 10, Pet. pp. 8-9, 51-52).

Conclusion.

It is respectfully submitted that the request for limited remand should be denied; that the Petition for a Writ of Certiorari herein should be granted; and that, after hearing, the judgments of conviction should be reversed with directions, to dismiss the indictment.

Respectfully submitted,

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Counsel for Petitioners.

SAM ROSENWEIN,
GEORGE COOK,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1966
No. 149

SANFORD E. ADAY, WALLACE DEORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Motion for Leave to File Brief of Citizens for Decent Literature, Inc. an Ohio Corporation as Amicus Curiae and Brief.

Citizens for Decent Literature, Inc. (CDL)[1] respectfully requests leave of Court, under Rule 42.1 of the Revised Rules of the Supreme Court of the United States, to appear as amicus curiae and to file a partial brief in support of the respondent in the above-entitled cause.

CDL's request to appear as amicus curiae prior to this Court's consideration of Aday's petition for a writ

[1]Citizens for Decent Literature, Inc., an Ohio corporation, with local affiliates throughout the United States, referred to hereinafter for convenience by its short title "CDL", is a non-profit, non-sectarian, and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent, and wholesome literature, by cooperating with law enforcement in the enforcement of the laws.

of certiorari was triggered by a newspaper announcement[2] that the Solicitor General of the United States had, in his memorandum reply, taken a position diametrically opposed to the prevailing rulings of the trial and appellate courts[3] below, which support the judgment of conviction herein. The Solicitor General's willingness to concede error and urge remand denies the people full representation in support of the judgment in this case and deprives this Court of the type of advocacy which is essential to a correct determination of the proper rule of law. The Solicitor General's concession is a major blow to the nation-wide effort to apply obscenity controls both in pending prosecutions and in convictions presently on appeal.

In opposing the position taken by the Solicitor General, CDL contends that Chief Justice Warren and Associate Justices Brennan and Fortas, as authors of the lead opinion in the "previous restraint", "no clear ma-

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[2]On September 21, 1966, the attention of CDL was directed to an article in the Washington Post, dated September 19, 1966, headlined "U.S. Refusal to Defend Conviction Heartens Sex Book Distributor" and reading in part as follows:

> "Sanford E. Aday, a mail order dealer from Fresno, California, was given a fresh chance to overturn criminal penalties when the Justice Department refused Friday to defend his conviction. . . .
>
> "The Solicitor General agreed with one of Aday's claims. He said the Court of Appeals had failed to apply a rule of the Ginzburg-Fanny Hill cases that established 'redeeming social importance' as a new and separate test of obscenity. Previously established standards measured the material's appeal to the prurient interests of the average person and whether the material was 'patently offensive'.
>
> "Since the lower court did not even mention the Supreme Court's new decisions, Marshall suggested that the justices send the case back for reconsideration. There, the prosecution and defense would argue over the need for a new trial."

[3]The decision of the United States Court of Appeals for the Sixth Circuit was handed down on March 22, 1966, the day *after* this Court's rulings in the *Ginzburg, Mishkin* and *Fanny Hill* cases.

jority decision" in *Fanny Hill*[4] never intended that their opinion, developed on those broad facts (previous restraint) be applied *in instructing a jury in a criminal obscenity prosecution* dealing with specific facts and specific conduct. If it was so intended, then the rationale expressed in their *Fanny Hill* opinion loses its integrity, for to apply that reasoning in a criminal prosecution is to turn *Roth* into an amorphous mass which either (1) bears no logical relationship to the rule laid down by this Court in 1957, or (2) if related, has acquired a tautological form which is misleading and subversive to the cause of public decency over which the obscenity statutes stand guard.[5]

In our view, the Solicitor General has completely misread the significance of the several opinions in *Fanny Hill*. In the first instance, and most importantly, the broad and unwarranted construction given to the opinion of Justices Warren, Brennan, and Fortas in *Fanny Hill* completely misses the fine constitutional point made by those three justices. Furthermore, that case was a no-clear majority decision.[6]

Although a motion such as this is not favored, and may be filed only if submitted a reasonable time prior

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[4]*Memoirs of a Woman of Pleasure, et al. v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413.

[5]If "utterly without social value" is to be required as a separate and independent test in the jury's deliberation, it, without doubt, creates a new *Roth* test which will overrule state statutes drawn in reliance on the *Roth* pronouncement. See Point 1D1, *infra* If it is required as an equivalent of the *Roth* test, then it has done nothing but create redundancy which did not exist before.

[6]To arrive at a constitutional test by "averaging" the several opinions which are in disagreement does not create respect for the rule of law. Particularly is this so when two of the six opinions being "averaged" refuse to follow the law (*i.e.*, to concede that Government has any right whatsoever to control obscenity). The Solicitor General's concession which speaks in

(This footnote is continued on the next page)

to the consideration of the petition for writ of certiorari, the unusual nature of one of the issues herein, and the very recent and unexpected turn of events which have brought this issue into focus,[7] characterize the case, movant submits, as one which is *sui generis,* and this motion as one which should be given favorable consideration on the matter of timeliness.

Consent to the filing has been requested of the parties herein. As of the date of printing, only the reply of the Solicitor General, dated October 19, 1966, has been received, which withheld consent because of the belatedness of the request.[8]

It is submitted that the arguments presented on this issue in the brief herein are of primary importance and should be considered by this Court on the petition for writ of certiorari in the above-entitled cause. It is therefore respectfully requested that the moving party be granted permission to file the within brief in support of the respondent's position.

Respectfully submitted,

CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
RAY T. DREHER,
Counsel for Citizens for Decent Literature, Inc.

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terms of "principles of the plurality opinion" completely ignores firmly rooted principles of our jurisprudence governing the force and effect of no clear majority opinions. See Justice Clark's dissent in *Fanny Hill,* 16 L. Ed. 2d 1, at page 18; *Commonwealth of Pennsylvania v. Robin, et al.,* 218 A. 2d 546. Musmanno dissenting (March 22, 1966), and the comments of Assistant Professor of Law G. Robert Blakey in 41 Notre Dame Lawyer 1058.

[7]We refer here to the Solicitor General's concession of error which leaves the People's cause without advocacy.

[8]It does not seem as though time should be made the essence at the expense of thoroughness. Of the 20 obscenity cases presently before this Court, three have been held over from the 1964 term and 14 from the 1965 term. None of these 20 cases have discussed the points of argument made herein.

IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Brief Amicus Curiae of Citizens for Decent Literature, Inc. an Ohio Corporation, in Support of Respondent.

ARGUMENT.

I.

THE FEDERAL CONSTITUTION DOES NOT REQUIRE A TRIAL JUDGE TO INSTRUCT AN OBSCENITY JURY IN A CRIMINAL PROSECUTION THAT, HAVING FOUND THE PREDOMINANT APPEAL OF THE SUBJECT MATTER AND THE PUBLISHER'S INTENT (PRESUMED) IS AN APPEAL TO PRURIENT INTEREST WHICH IS SUBSTANTIALLY BEYOND CUSTOMARY LIMITS OF CANDOR, IT MUST ALSO FIND, AS AN ADDITIONAL REQUIREMENT, THAT THE SUBJECT MATTER HAS NO REDEEMING SOCIAL IMPORTANCE. TO SO REQUIRE WOULD MAKE THE JURORS DETERMINERS OF THE LAW AS WELL AS THE FACT.

Amicus finds it difficult to comprehend how a prosecutive agency can entertain the view expressed in the Government's reply, given the historical facts herein and the law laid down by this Court in *Roth* and subsequent cases. The concession made is at complete variance with the law laid down in *Roth* and with the view of the law held by the United States attorneys who tried the *Aday* case, by Federal District Judge Noel Fox who interpreted the law in the trial court, and by the three justices in the Circuit Court of Appeals which recently affirmed the matter on appeal.

There is no *opinion* of this Court which the Solicitor General can point to as authorizing such a concession. The controlling law laid down by this Court in reviewing the federal conviction of Samuel Roth in *Roth v. U.S.*, 354 U.S. 476, is quite clear on this point, holding to the contrary on the issue which the Solicitor General is now willing to concede to be reversible error.

Aday was tried under substantially the same conditions as Roth. Federal District Judge Fox in *Aday* instructed his jury under substantially the same rule of law as did the trial judge in *Roth*. Judge Fox was entirely correct when he expressed his view that the lack of redeeming social importance, "is not an element of the definition (of obscenity) itself" or "an essential element of obscenity" but merely "a consequence of obscenity." (Appendix to Petitioner's Brief in the Court of Appeals, Vol. III, Page 535a.) Lack of redeeming social importance is the factor which permits the trial judge to give the matter to the jury on the issue of fact.[1]

[1]We believe the analysis of the Appellate Division of the Supreme Court, Second Department, to be correct when it said, in

A. The Roth Court, in Its Review of a Jury Trial Situation, Did Not Designate "Redeeming Social Importance" as a Matter for the Jury.

In *Roth v. U.S.*, this Court did *not* treat redeeming social importance as a consideration for the jury; rather that matter was a consideration taken up by the Appellate Court (this Court) in reviewing Roth's conviction on appeal.

At the most, "redeeming social importance" is a matter to be considered by the Court in deciding the *issue of law* which is involved.[2] It is not a test to be submitted to the jury in trying issues of fact.

The above distinction stems from the fundamental rule of law that the determination of obscenity is a mixed question of law and fact. The Court has a proper role and the jury has its proper role. The differentiation between the two is brought into focus when a case is tried to a jury (as was Roth), for there, the functions of the court and the jury are separated, and each takes on a distinguishing characteristic. Having separate and distinct functions, the two bodies are gov-

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reversing trial judge Shapiro's decision, in *N.Y. v. Birch, et al.*, 269 N.Y.S. 2d 752, 754 (May 2, 1966):

> "We do not agree with the learned justice at Special Term that these books *have sufficient redeeming importance* if they furnish escape literature to those who, as he puts it, 'because of lack of education, the meanness of their social existence, or mental insufficiency, cannot cope with anything better: This much social significance must by definition be inherent in literature which nevertheless has been proscribed by the Supreme Court as 'utterly without redeeming social importance'."
>
> "In view of the foregoing, the action must be remitted for trial, particularly on the question of obscenity ...." (Our emphasis.)

[2]It logically follows from *Roth v. U.S.*, that the trial court also should apply the same rule when it is faced with the *issue of law* involved at that stage of the proceedings, *i.e.*, whether in the first instance, a case has been made for submission to the jury.

erned by different rules in carrying out their respective duties and objectives. This is so because of the nature of the obscenity controversy.

The obscenity controversy places in the balance two opposing forces which are set in motion by our constitutional form of government. On the one hand, there is a claim of the individual's right of free speech and press, as guaranteed by the First and Fourteenth Amendments. On the other hand, there is the claim to supremacy of the right of government to regulate public morals, by proscribing obscenity, as reserved to state governments by the Ninth and Tenth Amendments. In *Roth,* this Court drew the balance between the two conflicting powers which it expressed in terms of the *Roth-Alberts* test, namely, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." When such a state of facts exists, the police power, reserved to state governments by the Ninth and Tenth Amendments, is operable, and can act to proscribe such material. In each jury case, therefore, the *court* must initially decide upon which side of the line the controversy is located — whether it is protected as a matter of law (which is a matter for the Court) or is a question of fact (for the jury as the fact finder.)

Consequently a trial court, when presented with the question whether the matter should be presented to the jury on the issue of fact, must ask itself *both* questions, "Does the matter as presented in the market place have redeeming social importance as a matter of law?" or, in the alternative, "Has a question of fact been raised for the jury?" *i.e.,* can it be said that reasonable men may differ whether the conduct involved is in

violation of the law and the material obscene." Justice Brennan dissenting in *Kingsley Books, Inc. v. Brown,* 354 U.S. 425, 448, 1 L. Ed. 2d 1469. They are not equivalent tests in as much as they are mutually exclusive, each describing what does not lie on the other side of the dividing line.

In such a case (jury trial) it is an entirely erroneous statement of the law to say that the Court in the first instance finds the obscenity crime and then submits the matter to a jury for its determination. The court does not find the fact before submitting the fact to the jury —the Court determines the law (*i.e.,* whether the conduct involved is protected as a matter of law because of redeeming social importance, or is a question of fact for the jury to decide).[3] Conversely, the jury does not determine the law (*i.e.,* whether the conduct is protected as a matter of law because of the redeeming social importance) along with the fact—the former is a matter for the Court's determination before it is ever submitted to the jury.

B. The Court's Refusal to Instruct the Jury on "Redeeming Social Importance" Was Not an Abridgment of Petitioner's Constitutional Rights.

1. The Instruction Requested by Petitioners Was an Improper Statement of the Law as Applied to the Facts of This Case.

The petitioners' requested jury instructions that

> "a writing may not be deemed obscene unless it is utterly without redeeming social importance. In

[3]The number of Trial and Appellate Courts which have erred in their analysis are substantial. To *amicus,* the principle seems elemental. See Justice Brennan dissenting in *Kingsley Book, Inc. v. Brown, supra.*

other words, the Constitution protects all material relating to sex except that which is totally devoid of social importance. The word 'redeeming' in the context herein refers not to a balancing of the alleged pruriency against the social importance of the material, but rather to the presence of matters of social importance in the content which gains for the material its position as constitutionally protected utterance. The jury will therefore keep in mind that in addition to the standards for judging obscenity, heretofore defined, no writing can be found to be obscene unless the writing is also utterly without redeeming social importance as the Court has defined it. . . ."

was derived from *Zeitlin v. Arnebergh*, 31 Cal. Rptr. 800, 813, a case whose facts are totally unrelated to the facts of this case. Though the language used by the California Supreme Court is apropos in the *Zeitlin* context, petitioners' facts afford no opportunity for its employment here as a proper instruction governing the law of this case.

In *Zeitlin*, a legitimate bookseller, Jacob Zeitlin, wanted to sell Paul Ferguson, a English professor at a Los Angeles college, a copy of "Tropic of Cancer," as to which there was a recognizable claim of literary value in the modern literary field. Under the variable approach to obscenity, no violation of the obscenity law is made out on these facts. *Ginzburg v. U.S.*, 383 U.S. 463, 16 L. Ed. 2d 31, 86 S. Ct. ....; *Mishkin v. N.Y.*, 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. ...., March 21, 1966. Nevertheless, Roger Arnebergh, the City Attorney of Los Angeles, threatened to prosecute

if the sale were made,[4] and with this background, both the bookseller and the professor, as plaintiffs, brought suit asking for a declaratory judgment to effect the sale on the grounds that "Tropic of Cancer" was not obscene.

On July 31, 1963, the California Supreme Court handed down a declaratory judgment that Tropic of Cancer was not obscene, in that it was not hard-core pornography, saying at page 813:

> "By examining the origin of the phrase in Roth we are led to a construction which gives the whole phrase a consistent meaning: 'redeeming' refers not to a balancing of the pruriency against the social importance of the material, but rather to the *presence* of matters of social importance in the content which will recover for the material, its position as constitutionally protected utterance."

While the language of the California court throughout a good deal of the opinion is inaccurate in that it treats too broad a reach beyond the narrow issue raised by the peculiar facts which brought the matter into court, it is now quite clear as indicated above that, *as applied to the limited facts of the Zeitlin* case, the language of the California court quoted above was substantially correct.

Restricting the language to the facts of the *Zeitlin* case, what the California court was in effect saying was that in the case of a sale of Tropic of Cancer to an English professor, the pruriency of the book could not be balanced against its social importance, as

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[4]The City Attorney's action was in keeping with constant obscenity concepts. No attempt was made to interpret the California Statute as employing variable obscenity concepts.

small as that social importance might be, and as great as the pruriency might be to the *average person* (general public). Quite obviously this is so because the plaintiffs (*Zeitlin* and *Ferguson*), in both their pleadings and case in chief had established a special audience to whom the book had a special redeeming social value. The fact situation under examination by the Court was one in which it was apparent the book was traded in the market place for its social importance (slight though it might be) and was not disseminated for its prurient appeal.

If the California Supreme Court meant that this slight social importance on limited facts would protect the subject matter *under all circumstances of sale,* then quite obviously under this Court's recent rulings, the California Court was wrong in its interpretation of the *Roth* test. *Ginzburg v. U.S., supra; Rebhuhn v. U.S.,* 109 F. 2d 512, cert. den. 60 S. Ct. 976, 84 L. Ed. 1399, 310 U.S. 629 (Second Circuit, 1940). See *United States v. Burstein,* 178 F. 2d 665 (Ninth Circuit, 1949). This is so because the California Supreme Court was interpreting a statute construed by the California Court as an attempt by the State Legislature to codify the *Roth* decision.[5]

To say that the language of the California Court quoted above was proper on the Zeitlin facts does not mean that it is proper language in all cases. More specifically, it does not mean that it is a proper instruction

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[5] *Zeitlin v. Arnebergh, supra,* at page 813:

"This language, indeed, is the language of Roth." Compare in this regard, the concurring opinion of Justices Fuld and VanVoorhis with that of Justices Desmond and Dye in *New York v. Richmond County News,* 175 N.E. 2d 681.

in the *Aday* case. An examination of the record in this case clearly demonstrates that the petitioners' business was diametrically opposite to that which was considered in *Zeitlin*. In *Zeitlin*, the bookseller and professor raised a legitimate claim in regard to a protected value; in *Aday*, the nature of petitioners' business establishes just the opposite. Aday was not trading in "legitimate" values. The audience to whom the material was aimed was clearly identified by the sales pitch on the covers and flyleafs of the books introduced into evidence and the subject matter itself. The record clearly establishes that petitioner was engaged in "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.",[6] which the *Roth* case indicates is a non-protected value.

2. The Instruction Requested by Petitioner Goes Beyond Anything Which the Zeitlin Case Authorizes.

Even assuming that the matter of "social redeeming importance" is not a matter of law for the court to decide[7] and may properly be given in an instruction to a jury as an *equivalent* of the test approved in the *Roth* case, still the instruction requested by the petitioners was erroneous, *because it defined the terms so as not to make them equivalent.*

In framing his instruction petitioner added to the language taken from Zeitlin the following sentence:

> "The jury will therefore keep in mind that *in addition to* the standards for judging obscenity, here-

[6]Also described as "pandering" in *Ginsburg v. U.S.*, 16 L. Ed. 2d 31, 36. Many fail to recognize that "pandering" can be established from the subject matter itself, as well as the advertising (use).

[7]Argued in Point 1A.

tofore defined, no writing can be found to be obscene *unless the writing is also* utterly without redeeming social importance as the Court has defined it. . . ." (Our emphasis.)

Petitioner's use of the words "in addition to . . . unless the writing is also . . ." makes it clear that what was being sought was the imposition of an *additional* test which was *not* the equivalent of the Roth prurient interest-dominant theme test.

Assuming the above language can be interpreted to state an equivalent, and not an additional requirement, still the wording is erroneous. The vice of the instruction lies in the fact that the language did not relate to the facts and circumstances in the controversy; that is, the "redeeming social value" which would authorize an acquittal was not required to be found from the circumstance of presentation and dissemination under which the material was traded in the market place. *Ginsburg v. U.S.*, 16 L. Ed. 2d 31, 38. Under petitioners' language, the jury, having found that publisher Aday's dominant intent (presumed) was to appeal to the prurient interest in a manner which was substantially beyond contemporary standards, would have to return a "not guilty" verdict if it felt that the book had value to sociologists or law enforcement in connection with the study of pornography and an analysis of its growth in recent years.[8]

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[8] *Amicus* concedes that a study of the contents of Sex Life of a Cop published in 1958 has limited value to specialists investigating the growth of pornography in the years 1958 to 1966. Without an understanding of its contents as a level of reference, one cannot recognize the fantastic growth in salaciousness of the material offered, or check the progress (or lack of the same) of law enforcement in this area.

C. The Result Reached in "A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of the Commonwealth of Massachusetts" Does Not Stand for the Proposition That a Jury in a Criminal Case Must Be Instructed in a Manner Other Than That Approved in Roth v. United States.

At page 28 of the Petition for a Writ of Certiorari, petitioners cite the *Fanny Hill* result as indicating that a trial court must instruct the jury in a criminal case on the requirement that the material be "utterly without redeeming social importance." The Fanny Hill result however is *inapposite* on this point in that the requirement voiced by Chief Justice Warren and Associate Justices Brennan and Fortas in the lead (not the majority) opinion[9] that "each of the three federal constitutional criteria is to be applied independently" *was in regard to an injunction decree and not, as here, a criminal prosecution.* There are problems in an injunction action which are not present in a criminal prosecution and which, depending on the circumstances, may require the case to be handled in a different manner.

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[9]Fanny Hill was a no-majority decision with only three justices joining in the lead opinion. As to the net effect of the lead opinion, see the evaluation of Justice Clark in his opinion in *Fanny Hill*, 16 L. Ed. 2d 1, at page 18. See also the opinion of Justice Michael Musmanno dissenting in *Commonwealth of Pa. v. Robin*, ... Pa. ...., 218 A. 2d 546 (Ma 22, 1966) and the comment of Assistant Professor of Law G. obert Blakey in 41 Notre Dame Lawyer 1055 at 1058.

1. The Broad Scope of the Inquiry in a Restrictive Injunctive-Type Situation Requires That the Tests Be Applied Independently, so That All Factual Situations Are Considered.

The requirement voiced in the opinion of Justices Brennan, Warren and Fortas at page 6 that:

> "A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. *Each of the three federal constitutional criteria is to be applied independently.* . . ." (Our emphasis.)

is not so startling when one considers that this Court in *Fanny Hill* was reviewing an injunctive-type decree rather than a criminal conviction.[10]

It does not follow, however, that the criteria are applied independently in criminal cases, nor does it mean that where, as in this case, there is a proper finding in a criminal case that the dominant appeal is to prurient interest (which, as defined in the Model Penal Code, includes patent offensiveness) the subject matter may still have redeeming social importance under the circumstances at issue. In a criminal case, a finding that the dominant theme—prurient interest test—has been met would necessarily be inconsistent with a finding of redeeming social importance. See here the legislative policy statement contained in the Utah Statutes defining obscenity, *infra* which equates "prurient interest" with "utterly without redeeming social importance."

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[10]Justice Brennan drew attention to this distinction at Footnote 3 of his opinion in the *Fanny Hill* case.

In the review of an injunction, the United States Supreme Court is confronted by a decree forbidding *all* distributions and encompassing a myriad of fact situations. In contrast, a criminal conviction embraces one given set of facts. The broad scope of the inquiry in an injunction situation requires that the test be applied independently, so that *all* factual situations are considered.

For example, assuming slight historical value, as hypothesized by the Massachusetts Supreme Court—what of the possible distribution to literateurs who might wish to study Fanny Hill for its historical significance in the development of the English novel, or the sociologists, who might have occasion to refer to it in their studies, or attorneys who might study it in connection with their efforts to arrest the spread of pornography?

The Massachusetts Statutes under consideration by the High Court, both criminal and civil, allowed no specific exemptions or defenses for situations which did not involve "pandering." Compare in this regard, the American Law Institute recommendations contained in Section 207.10(4)(c) of the Model Penal Code (1957 draft) which provides:

> "The following shall not be criminal offenses under this section. . . . (c) Dissemination to institutions or individuals having scientific of other special justification for possessing such material. . . ."

Moreover, the Massachusetts statutory procedure authorized "collateral uses" of the injunctive decree, which further gave the impression of inhibiting legitimate use of the book. Footnote 4 of the opinion of Justices Brennan, Warren and Fortas noted that Section

28H of the Massachusetts Injunctive Statute, made a decree that a book was obscene "admissible in evidence" in a criminal prosecution under Section 28B and provided that "if prior to such offense a final decree had been entered against the book, the defendant, if the book be obscene . . . shall be 'conclusively presumed to have known' the book to be obscene." Justice Brennan's opinion noted at footnote 5 that such "collateral uses of the declaration" would have a "serious inhibiting effect on the distribution (legitimate) of the book. . . ."

Under a strict interpretation of the Massachusetts Statutes, the distribution noted above (to literateurs, sociologists, etc.) would have been barred by the Massachusetts decree.[11] To draw in focus the constitutional issue underscored by the Opinions of Justices Brennan, Warren, and Fortas, one need only to compare in contrast the results which should follow in the criminal forum, were the same factual situation to exist. Such distributions are not a violation of the obscenity laws.[12] There is absent the pandering aspect. The predominant appeal of the material is not to prurient interest, but is rather to a legitimate social purpose which has social value. Accordingly, the Court would be required to rule that, as a matter of law, there was redeeming social importance and no jury question was presented.

In our view, the opinion of Justices Brennan, Warren, and Fortas would have been more precise had it expressed the obvious—that the theory of "independ-

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[11]The "conclusive presumption" position of the Massachusetts Injunctive Statute is criticized by the drafters of the Model Penal Code. See the reporter's comments in the 1957 draft at page 51.

[12]See the Tropic of Cancer result discussed in Point I-B-1.

ent" tests, relating as it does to variable obscenity concepts, has limited application to the injunctive type proceeding and is not to be carried over and applied carte blanche in criminal areas. If these three justices are to be consistent, they would have to agree that in a criminal case the "dominant theme—prurient appeal" test and "social value" test coincide, so that in the criminal forum there is but one, and not several independent tests.

In criminal cases, it is at complete odds with the "variable" concept expressed by the majority opinion in Mishkin and Ginzburg to say either that the "utterly without redeeming social value" phrase is an independent test, or that it is a necessary part of the definition of "obscene." If the dominant appeal of the material is aimed at prurient interest as defined in the Model Penal Code, then the conduct is in the area of criminal activity and the subject matter is utterly without redeeming social importance under the circumstances. Utah Revised Statutes, Section 76-39-11. In criminal cases, unlike the situation which exists in injunction cases, a specific set of facts are in issue and the two tests "coalesce."

It must be observed that, in reviewing the book Housewife's Handbook on Selective Promiscuity, the majority in Ginzburg did not apply the social value test independently, but rather considered only the dominant appeal of the material in the light of the precise facts being reviewed.[13]

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[13]In *Ginzburg* the Court said at page 39:

". . . we cannot conclude that the court below erred in taking their own evaluation at its face value and declaring the book as a whole obscene *despite the other evidence*. . . ." (our emphasis).

D. To Superimpose "Utterly Without Redeeming Social Importance" as an Additional Test for a Jury to Consider Under the Roth Test, at This Late Date, Would Frustrate the Public Policy of This Nation and the Efforts of Law Enforcement in Its Search for a Means of Controlling Obscenity.

We have heretofore pointed out that the phrase "and is utterly without redeeming social importance" was never intended by this Court as a test for the jury in the *Roth* case.[14] Before commenting upon the consequences which would flow from a reversal of this position, it is important to focus upon the circumstances under which the issue first appeared in this Court in the *Ginsburg, Mishkin* and *Fanny Hill* cases—an event which merits special attention.

Following the arguments in the *Fanny Hill* case on December 7, 1965, one well-informed attorney (apparently from a defense firm in Washington or New York, judging from the tenor of the conversation) while waiting in line outside the cloakroom of the United States Supreme Court, was overheard by CDL attorneys to remark to one of his associates that the most significant feature of the three cases was the fact that all three governmental attorneys *conceded without argument* that there were three separate tests, whereas six months before, said he, "No government attorney would accede to that concession." And so it was—there never was any full-scale opposition or argument on this issue in those cases. The three governmental attorneys entered a default on this very important issue as an expedient

[14]The initial appearance of the phrase and the forces operating to perpetuate its existence are discussed hereinafter in Point 1D1.

route in presenting their basic arguments.[15] For want of argument, the issue was never examined closely. Had a close examination been made it would have revealed the path to be covered with primroses.

1. Were the Court to Reverse the Position It Took in Roth, the State Obscenity Statutes Enacted in Reliance on That Decision, and the Successful Prosecutions Rendered Under Those Statutes Would Be Invalidated.

It should be noted that but two states have included the words "and is utterly without redeeming social importance" in their defeinition of "obscene," in the manner urged by petitioners. California Penal Code Section 311.2,[16] Tennessee Code Annotated Section 76-39-11.[17]

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[15]See the transcript of the arguments in the *Fanny Hill* case on December 7, 1966 at page 9:

"MR. JUSTICE BRENNAN: Do you think it's clear, do you, as apparently your predecessors here today have, that the Court has clearly established a test of obscenity as a 3-component test, as an appeal to prurient interest, and utterly without social value and something that is patently offensive?

"MR. REMBAR: Yes, I think that is the implication.

"MR. JUSTICE STEWART: Where do you get that, from what cases?"

No further discussion was had in the arguments on this point.

[16]Assembly Bill 1979 as originally introduced during the 1961 session of the California Legislature did not have the phrase "and is utterly without redeeming social importance" as a part of the definition of obscenity. After four amendments in the Assembly and two in the Senate, which the Assembly refused to concur in, the amendment "and is matter which is utterly without redeeming social importance" was added by a 6-man committee in conference (three Assemblymen, three Senators) and passed by both bodies and signed into law. Senate Journal page 4426 of June 16, 1961 and Assembly Journal of June 16, 1961 at page 5975. It thus appears that the bargain struck by the joint committee and not this Court's direction was the original motivating force for this "view." As noted in petitioners' brief at page 16, District Judge Fox recognized the woodpile wherein the thought first arose.

[17]The Tennessee bill, as originally introduced, did not have the phrase "and is utterly without redeeming social importance"

(This footnote is continued on the next page)

One other state, the State of Utah, employs the same phrase—but the Utah statute followed an entirely different approach, in that it specifically adheres to the rule laid down by this Court in *Roth* in 1957. The Utah Legislature used the phrase *not* for the purpose of setting forth an additional requirement for the fact finder, but rather for the purpose of making it known that as a matter of state policy "prurient interest", as therein defined, had no social value. Section 76-39-11 of the Utah Statutes provides in part:

"76-39-11. Whenever it appears in this act, the word 'obscene' shall have the following meaning:

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as a part of the definition of obscenity. Some indications of how the phrase found its way into the Tennessee law is revealed in a letter of the Counsel for Periodical Distributors Association, Inc., to Mr. Jack Drown, one of the five independent wholesale distributors in Los Angeles County. The letter was filed with the Los Angeles County Commission on Indecent Literature in opposition to Proposition 16, an Anti-Obscenity Statute appearing as an initiative measure on the California ballot on November 8, 1966. The California initiative measure generally follows the American Law Institute Model Penal Code definition of obscenity (which does not contain the phrase), approved by this Court in *Roth*, and was proposed as a means of overcoming the stagnation in obscenity control caused by the adoption of the California legislation in 1961. The advice of the C.P.D.A. to Mr. Drown was to follow the procedures taken by their organization in Tennessee:

> "Sid Bernbaum of Memphis, Tennessee, and Bill Palmer of Topeka, Kansas, have had a substantial amount of success in fighting overly restricted obscenity legislation. It might be a good idea to contact them with respect to tactics and procedure if you find it necessary to actually campaign against this measure. Sid Bernbaum and the other Tennessee wholesalers worked with representatives of the movie industry, and you should consider the possibility of a similar joint approach in California.
>
> "Please keep us posted as to what develops and let us know if we can be of any further assistance. Recently, at the request of the attorneys for the wholsalers in Tennessee, we wrote a long opinion letter to the key members of the Tennessee Legislature, and *the result was that the C.P.D.A. recommendations were followed strictly down the line.* If a similar step seems advisable in California, we would be glad to take it." (our emphasis.)

> Whether to the average adult person, applying contemporary community standards, the dominant theme of the material or the conduct taken as a whole appeals to the prurient interest. . . . *Prurient interest* shall mean a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and *is a matter which is utterly without redeeming social importance.*" (Our emphasis.)

It is apparent that the drafters of the Utah Legislature had a crystal-clear understanding of the Roth concept. Were petitioners herein to prevail, would require this Court to strike the Utah Legislation as Unconstitutional.

The remaining State Legislatures which have amended their obscenity statutes to conform to the *Roth* test have codified the standard set forth in *Roth* in reliance on the jury instructions and the holding in that case. This, Justice Warren noted in his dissent in *Jacobellis v. Ohio,* 378 U.S. 184, 199, 84 S. Ct. 1676, 12 L. Ed. 2d 793, 805:

> "Recently this Court put its hand to the task of defining the term 'obscene' in Roth v. U.S. . . . *It has also been relied upon by legislatures. . . .*" (Our emphasis.)

If this Court now were to change the instructions which must be given to a jury from that which it specifically had approved in *Roth,* then surely those state statutes which were adopted in reliance on the *Roth* test will fall, together with the successful prosecutions which were achieved under those statutes.

The no clear majority result and confusion in the *Fanny Hill* case has already brought about a crises to law enforcement in one state. In *Arizona v. Arizona Magazine Distributors, Inc.*, Unreported, in the Superior Court of the State of Arizona in and for the County of Mariposa, No. 47264, Superior Court Judge Howard F. Thompson, ruling on a motion before a trial *de novo* after a jury conviction in the justice court, held the Arizona State Obscenity Statute, adopted by the Arizona State Legislature in 1964 in reliance on Roth, to be unconstitutional for this very reason.[18] Said Superior Court Judge Thompson:

> "The statute defines obscenity as 'appeal to prurient interest . . . going substantially beyond customary limits of candor. . . .' The statute, we have pointed out, contains the two distinct elements set forth in *Manual* which the Court declared were necessary in the proof of obscenity as defined in Roth, i.e., prurient interest appeal and patent offensiveness. Omitted from the statute, however, is the third element: *The material must be utterly without redeeming social value.* In Memoirs it was held that under the Roth definition the three elements must coalesce before the material can be prosecuted as obscene.
>
> 'A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be

[18]The case is presently on appeal.

weighed against nor cancelled by its prurient appeal or patent offensiveness. Memoirs v. Mass.'

"Lacking the social value criterion in its definition of obscenity, the statute thus fails to meet the constitutional requirements set forth in Memoirs as necessary to meet the Roth test of obscenity." (Our emphasis.)

Unless the false impression created by the opinion of Justices Brennan, Warren, and Fortas in *Fanny Hill* is corrected by this Court in the case herein, the same is certain to cause greater havoc than did this Court's development of restrictive rules in "previous restraint" cases during the period 1958-1965. See CDL Commentaries on the Law of Obscenity, Sept. 1966, Vol. 1. No. 3, pages 1-4 *et seq.* and CDL's Brief Amicus Curiae in the *Fanny Hill* case at pages 38, *et seq.*

2) The Recent Mistrial in U.S. v. Hamling Is a Preview of What Reasonably Can Be Expected Were This Court to Retreat From Its Original Position in Roth That the Prurient Interest Defined in That Case Is Itself a Matter Which Is Utterly Without Redeeming Social Importance.

Consistent with the Solicitor General's position on appeal in this and the *Ginsburg* case (and equally as incomprehensible) was the position taken by the government attorneys at the trial level in the recent federal prosecution in Houston, Texas, against the "Nightstand operation". *United States v. Hamling et al.*, U.S. Dist. Court for the Southern District of Texas, Houston Division, CR 65-H-172, unreported.[19] The prosecutor

[19]A federal grand jury at Houston, Texas, on Sept. 11, 1965, indicted 7 persons and 4 corporations for interstate shipment

(This footnote is continued on the next page)

himself sowed the seeds for the hung jury and mistrial which ensued.

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of obscene paperbacks books. Indicted were the publishers and national distributors located in San Diego, California, a printer in Los Angeles, California, and a second printer in Sandusky, Ohio, and the 4 corporations involved. The books involved in the indictment were: Orgy Club by Tony Calvano, copyright 1964 by Pillar Books, PB 833; Sin Summer by Alan Marshall, a Pillar Book, PB 834; Shame Hunger by Tony Calvano, copyright 1964 by Pillar Books, PB 850; Temple of Shame, a Leisure Book, LB 673; Virgins Inc., a new Nightstand book, NB 1731; Passion Carousel by Tony Calvano, copyright 1965, by Corinth Publications, 5839 Mission Gorge Road, San Diego, a Sundown Reader, SR 543; and Swap Sect by Tony Calvano, copyright 1965, Corinth Publications, 5839 Mission Gorge Road, San Diego, a Nightstand Book, NB 1738.

See 41 Notre Dame Lawyer 1055 wherein Assistant Professor G. Robert Blakey comments at footnote 6:

> "The 'Nightstand' books have been aptly described as 'unqualifiedly pornographic' and just as obviously 'thrown together' for a 'quick sale'. Lacking literary merit, they neither shock nor offend because they are so blatant and blunt. Written in a dull and slimy style, they are void of subtlety and spare nothing for the imagination."

Slough and McAnany, Obscentiy and Constitutional Freedom—Part I, 8 St. Louis University Law Review 279, 331 Note 189 (1964).

See also CDL Brief Amicus Curiae in *Redrup v. N.Y.*, Oct, Term 1966, No. 3 at page 30, reading:

> "The reputation of Nightstand Books, Ember Books, Leisure Books, Pillar Books, Sundown Readers, Midnight Readers, Evening Readers are well known—notoriously known, to the book sellers on 42nd Street. . . .
>
> "Similar books from the same publishing firm have been held: (1) to be hard-core pornography by the New York Court of Appeal under the New York obscenity statute. *Keney v. N.Y.*, in the Supreme Court of the United States, October Term 1966, No. 2 (Lust School, Lust Web, Sin Servant); *N.Y. v. Motherson*, 16 N.Y. 2d 509 (Lust Team); *Fried v. N.Y.*, 238 N.Y.S. 2d 742, cert. den. 378 U.S. 578 (College for Sinners); (2) to be hard-core pornography by the Supreme Court of Kansas under the Kansas obscenity statute. *A Quantity of Books v. Kansas*, 19 Kans. 13, 379 P. 2d 254, reversed on procedural grounds 378 U.S. 205 (Born for Sin, No Longer a Virgin, Sin Girls, Sin Hotel, Miami Call Girl, Lesbian Love, Sex Jungle, The Lustful Ones, The Wife Swappers, Sex Model, The Lecher,

At the commencement of the Hamling trial, District Judge Joe Ingraham made the following statement to counsel:

> "Now, I want to make this announcement, that I intend to try this case on the pattern of the Aday case in the Sixth Circuit, which was affirmed by the Sixth Circuit, and to the extent that it is applicable to this case, I expect to charge the jury in much the same manner, so, if that is any assistance to counsel on either side of the table, we have to proceed in one way or another, and that is a case that I expect to follow."[20]

Lust Goddess, Sin Camp, $20.00 Lust, Convention Girl, The Isle of Sin, Orgy Town, Sex Spy, Trailer Trollop, Flesh Is My Undoing, Sex Circus, Malay Mistress, The Sinning Season, Sin Song, Passion Slaves, The Sinful Ones, Lover, Passion Trap, Sin Cruise, Seeds of Sin); *Kansas v. A Quantity of Books*, 197 Kans. 306 (July 14, 1966) (Sin Hooked, Bayou Sinners, Lust Hungry, Shame Shop, Fleshpot, Sinner's Seance, Passion Priestess, Penthouse Pagans, Shame Market, Sin Warden, Flesh Avenger); (3) to be obscene by the Circuit Court of Appeals for the Second Circuit under the federal obscenity statute, *Books Inc. v. U.S.*, 358 F. 2d 935 (April 12, 1966), (Lust Job); (4) to be obscene by the Illinois Supreme Court under the Illinois obscenity statute, *Illinois v. June Sikora*, 204 N.E. 2d 768 (Jan. 21, 1965) (Crossroads of Lust, Passion Bride, Lust Campus); see also *Illinois v. Pascarello*, unreported X64-2122, 2123, a jury verdict holding "Sin Bin" and "Shame Hunger" obscene; (5) to be obscene by the Georgia Supreme Court under the Georgia obscenity statute, *Corinth Pubs. Inc. v. Wesberry*, 146 S.E. 2d 764 (Dec. 18, 1965), (Sin Whisper); (6) to be obscene by the Appellate Division of the Circuit Court of Connecticut under the Connecticut obscenity statute, *Conn. v. Onorato*, 2 Conn. Cir. 428, 199 A. 2d 715, 716 (Wild Flesh, The Orgy Boys). The similarity in the trademark of such books and their patent offensiveness can be recognized at a glance." Photographs of the front and rear covers of 46 of the paperbacks described above appear in the appendix to the CDL-Redrup brief (photos, pp. 1-12).

[20]Reporter's daily transcript of proceedings, August 2, 1966, pages 964-965. See also petitioner's reply to the memorandum for the United States herein at page 3, footnote 1.

At the conclusion of the trial however, the U.S. Attorney abandoned the law set forth in *Roth* and asked that the test for obscenity given by Judge Fox be changed *to require proofs as to three separate elements.*[21]

Burdened with a redundant and misleading instruction such as this, it was no mystery as to why the jury was hung after nine days of deliberation.[22] One juror gave his personal evaluation of the instruction in an interview after the mistrial was declared. The Houston Post of September 3, 1966, reported his account as:

> "Another juror, Jack Hardie, 6355 Underhill, said he felt the three tests for legal obscenity were drafted in an ambiguous manner *purposely to prevent 12 people from being able to agree.*" (Our emphasis).

Amicus submits that the juror stated the obvious. How can a jury not be misled when it is told that after it finds that the dominant theme of the material and the publisher's intent (presumed) is an appeal to prurient interest which is substantially beyond customary limits

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[21]See Houston Chronicle dated Aug. 23, 1966, page 6, section 1 reading "Federal Judge Joe Ingraham today agreed to give the jury a more restrictive definition than he had planned, Prosecutor Morton Susman asked the judge to define obscene in line with the recent U.S. Supreme Court decision in a case involving the book 'Fanny Hill'. This decision further clarifies the three elements the prosecution must prove to establish the matter is obscene: the material in question exceeds the national standards on sexual candor, appeals to the prurient interest of the readers, and lacks any social value. Susman said that the more restrictive definition would make the case more difficult for the prosecution, but that he thought it more proper from a legal standpoint."

[22]To complicate matters, the trial judge refused to charge the jury on "pandering", holding there was insufficient evidence of the same. Houston Chronicle, Sept. 4, 1965. The Houston Post, Sept. 3, 1966, reported "an unofficial tabulation of jury voting indicated the closest they came to a unanimous opinion was a 10-2 vote that the defendant had 'specific intent' to violate the law."

of candor (patently offensive), *it must also find that it is utterly without redeeming social value!* Under this instruction the jury is actually misinformed as to the basic reason for proscribing obscenity, the inference being that the law sees nothing wrong with the appeal to the prurient interest described in *Roth.* On this issue, the remark of defense attorney Rembar in the *Fanny Hill* arguments [Tr. p. 7] and Justice Brennan's comment thereon, appear in point.

> "MR. JUSTICE BRENNAN: Doesn't it mean that? We are dealing with, I guess, by hypothesis with what is pornographic material as to which, however, a lot of acknowledged literary critics are willing to say it has some literary and therefore social value, because it is well written.
>
> "MR. REMBAR: If by pornographic your Honor means sexually arousing or lustful in terms of the decisions, the answer is yes. *I think it has been clear for some time that material whose effect is to stimulate a sexual response in the normal person is not for that reason to be denounced. I think that* such—(our emphasis).
>
> "MR. JUSTICE BRENNAN: Roth said that?"

The misleading quality of the jury instruction is pointed up by comparing it with the simple statement appearing in the Utah Statute (*supra*) *which defines "prurient interest"* (*i.e.*, a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor) *itself, as a matter which is utterly without redeeming social importance.*

The California experience with Penal Code Section 311.2 as enacted by the 1961 Legislature (*supra*) has

been identical. Its enactment and the prosecutors' experience thereunder was a signal for prosecutors to cease trying to enforce the law. Using this test, the California courts have guaranteed immunity to the publishers as they flood the nation with smut materials from the refuge of that state. See CDL Brief Amicus Curiae in Fanny Hill at pages 81-85; 41-43 nor has this Court's recent decisions in *Ginzburg* and *Mishkin* changed this result. On Tuesday, November 8, 1966, the Los Angeles Daily Law Journal reported the most recent California "experience" under the view of the law which petitioners herein and the Solicitor General urge upon this Court.

> NOT OBSCENE IS RULING ON BOOKS BY JUDGE HOLLAND.. A Superior Court judge Friday dropped conspiracy charges against four men accused of publishing and distributing obscene paperback books.
>
> Judge Kenneth L. Holland ruled that books were not obscene even though he said they "fall short of satisfying the customary limits of candor . . ."
>
> The books, entitled "Lust in Leather," "Whipped Passions," "Perversion Unique" and "Club Unique," were said, by Judge Holland to follow a uniform format . . . just barely within the plae of obscenity statutes and court decisions.
>
> Freed from an earlier indictment were David Zentner,[23] 47, and editor and distributor, and Reuben Sturman, 37, both of Cleveland, Ohio.

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[23]Zentner's form letter of "requirements" to his authors in the Boudoir Classic series appears in CDL's Brief Amicus Curiae in *Fanny Hill* at page 81. Said Zentner in part: "What we basically seek is off-beat sex, with an emphasis on deviations. . . . Pest is secondary . . ."

Also cleared were writer Will Kunne, 46, of Rialto, and Tom Vail, 57, of 2311 Meadowvale St., Los Angeles.

In his decision, Judge Holland noted that the books, distributed in a series entitled "Boudoir Classics," appeal to the "average man's insatiable curiosity in sex, in all its forms, as may be inferred from enormous sales volume in night stand type books."[24]

Judge Holland's opinion further stated that none of the books can be said to "appeal predominantly as a whole to any single deviant group or combination of groups, such as the material designed for homosexuals."

Arguments by defense attorney claimed there were more than 37 million "night-stand type" books with a retail value of more than $25 million.

The four originally were indicted in December, 1964.

Conclusion.

Amicus respectfully submits that this Court stands at a crossroad.

This Court's obscenity decisions between 1958-1964, although misunderstood by a substantial number of attorneys, courts and commentators, have followed a pattern which is both logical and consistent. See CDL Commentaries on the Law of Obscenity, Vol. 1, No. 3, pages 1-1 through 1-11 and Brief Amicus Curiae of

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[24]Judge Holland's use of the "enormous sales volume in Night-stand type books" as a level of reference is evidence that this Court's past decisions in previous restraint cases have given scandal to the lower Courts and are at the root of the obscenity confusion in the courtroom. See CDL Commentaries of the Law of Obscenity Vol. 1, No. 2 at pages 1-7 (bottom of page).

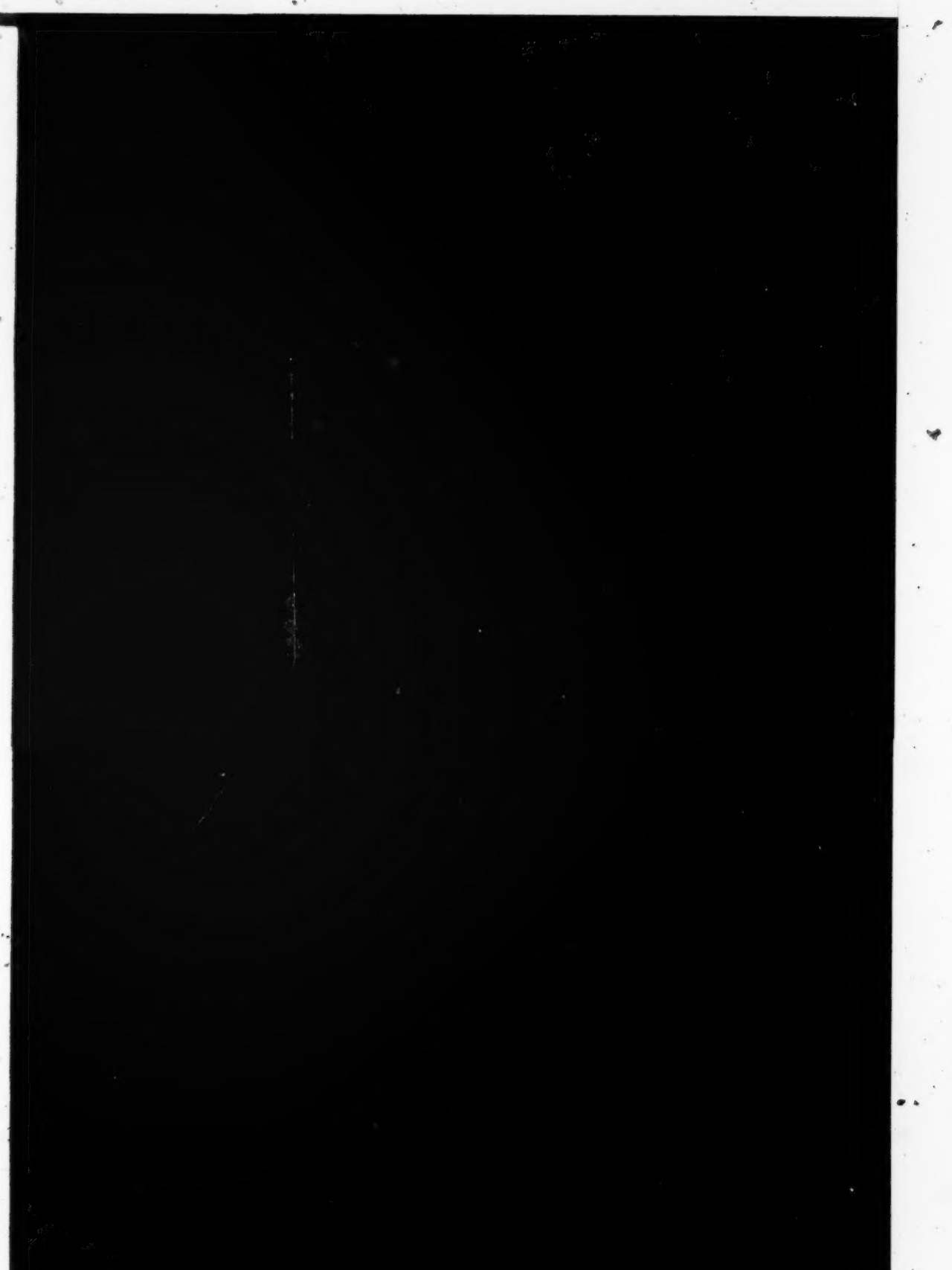
CDL in *Ginzburg v. U.S.*, pages 32 to 53. The majority opinion in *Ginzburg* and *Mishkin* and the no clear majority decision and the separate opinion of Justices Warren, Brennan and Fortas, properly interpreted, continue this pattern and give promise of bringing complete understanding to what has been described as a muddied area of the law. See Natl. Decency Reporter, Vol. 3, No. 6, June-July 1966, "Analysis of the Ginsburg, Mishkin and Fanny Hill decisions" and Obscenity in the Supreme Court by G. Robert Blakey appearing in America (August 13, 1966 edition) at page 156.

In this case, a collateral attack is being made on *Roth,* which, if allowed to succeed gives every promise of destroying the progress made by the Court thus far. It is not fanciful thinking to predict that, were this Court to engraft an additional requirement onto the *Roth* test in the manner urged by petitioner, the same would create greater havoc than did this Court's development of restrictive rules in previous restraint cases during the period 1958-1964—but even worse, it would introduce a notion which is basically unsound, namely, that the public policy of this Court does not look upon the appeal to prurient interest, described in *Roth,* as being utterly without social importance.

We view the present controversy with the utmost concern and earnestly solicit this Court not to follow the primrose path which the parties herein have made so inviting. The petition for certiorari should be denied.

Respectfully submitted,

CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
RAY T. DREHER,
Counsel for Amicus Curiae.



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IN THE

Supreme Court of the United States

October Term, 1966
No. 149

SANFORD E. ADAY, WALLACE DE ORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari, to the United States Court of Appeals for the Sixth Circuit.

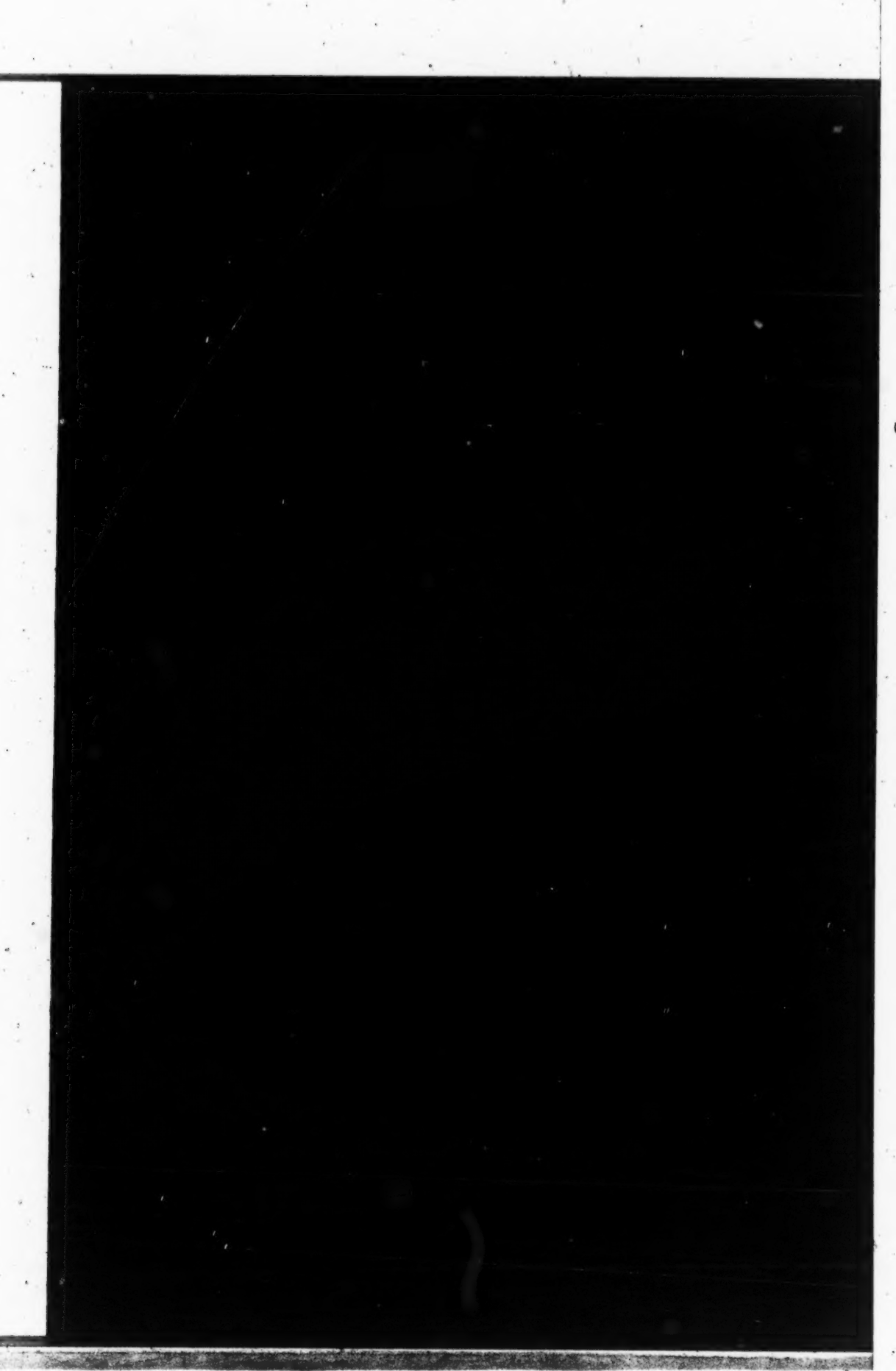
Motion for Leave to File an Appendix to Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondent.

Citizens for Decent Literature, Inc. (CDL), respectively requests leave of Court to file the Appendix herein, being a copy of Judge Kenneth Holland's trial court opinion, filed on November 4, 1966, in the Superior Court of the State of California for the County of Los Angeles in the case of People of the State of California v. David Zentner, Reuben Sturman, Will Kuenne and Tom Vail, S.C. No. 297456, to be attached as an appendix to the Brief Amicus Curiae of Citizens for Decent Literature, Inc., heretofore submitted to this Honorable Court for filing.

Judge Holland's opinion was not available for inclusion in said Brief at the time of printing, but was referred to therein at page 30 as an example of what is happening in trial courts in California under the so-called "three criteria test", alleged by petitioner Aday to have been propounded by this Court as a constitutional standard in obscenity prosecutions.

Respectfully submitted,

CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
RAY T. DREHER,
Counsel for Citizens for Decent Literature, Inc.



APPENDIX.

Memorandum of Opinion Upon Granting Motion to Dismiss Indictment on Constitutional Grounds.*

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff, v. David Zentner, Reuben Sturman, Will Kuenne, and Tom-Vail, Defendants. No. 297 456.

On December 9, 1964, eleven persons, including the above-named four defendants were indicted by the Grand Jury of this County for the crime of conspiracy (182.1 Penal Code) to violate Section 311.2 Penal Code. The indictment with its recital of eight overt acts alleges that the defendants, in their various roles as authors, publishers or distributors, conspired to and did prepare, publish, and distribute to wholesale and retail outlets throughout the United States four obscene paperback books entitled "Lust in Leather," "Whipped Passions," "Perversion Resort," and "Club Unique," under the trade name "Boudoir Classics."

Four defendants have never been served with the warrant and are not before the court. The indictment as to the three other defendants has been dismissed pursuant to 995 Penal Code.

On the trial date, but before commencement of trial,[1] the four remaining defendants moved to dismiss the

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*Judge Holland's Memorandum of Opinion contains no footnotes. The footnotes which have been added are those of *Amicus* CDL, as comment on what we regard as the more glaring errors arising out of an application of the "three criteria test".

[1]California Penal Code Section 1238 provides that an appeal may be taken by the People: (1) from an order setting aside

(This footnote is continued on the next page)

indictment on the constitutional ground that the four books are not obscene as a matter of law.

In Zeitlin v. Arnebergh (1963) 59 Cal. 2d 901, a declaratory relief action, our Supreme Court held (p. 904) that the issue of obscenity is a question of "constitutional fact" that rests ultimately with the court. And on pages 910 and 911 the court apparently adopted Section 251.4 (4) of the Proposed Official Draft (1962) of the Model Penal Code proposed by the American Law Institute as the case law of this state. This Section reads in part: "The Court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene." After quoting this section this court states:

> "What we preserve in the present draft is *the independent judgment of the court on the question of obscenity* without impairing the defendants' right to a jury trial." (Emphasis added.)

This court as well as other trial courts on both the Superior and Municipal Court levels consider Zeitlin as mandate directed to all state trial courts to entertain pre-trial motions to dismiss such as is now before this court. A year later, June, 1964, the Supreme Court of the United States buttressed the Zeitlin doctrine in Jacobellis v. Ohio 378 U.S. 184, 12 Law Ed. 2d 793 by its statement (278 U.S. 188-190) that that court as well as all other courts cannot avoid making an in-

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the indictment . . . and (2) from a judgment for the defendant on a demurrer to the indictment. . . . The Los Angeles County District Attorney did not appeal Judge Holland's dismissal. *Cf.* American Law Institute Model Penal Code (1957 draft) Section 207.10. (3) The Statute of Limitations for the conspiracy-felony crime is three years. California Penal Code Section 800.

dependent constitutional judgment on the facts of the case on the issue of obscenity where the issue is raised.[2] The Zeitlin case is cited with approval in footnote 6.

Zeitlin, unfortunately, does not spell out any guide lines for trial courts to follow in ruling on these motions, particularly with respect to the question as to whether or not the court may receive in evidence and consider other published works and the volume of their circulation on the issue of contemporary standards of candor, and also of the methods of publication, distribution and advertising as tending to prove "pandering" which may now be considered by the court as probative evidence on the issue of obscenity, at least in close cases. (A book named "John Cleland's Memoirs of a Woman of Pleasure," v. Attorney General of the Commonwealth of Massachusetts, 383 U.S. 413, 16 Law Ed. 2d 1, hereafter called Fanny Hill; Mishkin v. State of New York, 383 U.S. 502, 16 Law Ed.2d 56; Ginzburg v. United States, 383 U.S. 463, 16 Law Ed.2d 37); these three cases were decided March 21, 1966; collectively they will hereafter be called "Ginzburg cases," and individually as Fanny Hill, Mishkin or Ginzburg.

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[2]We find no fault with the "independent constitutional judgment" concept propounded by members of this Court. However, if a trial judge is to be given the awesome power of bringing the trial of a pornographer to a screeching halt, should not this Court give the Nation some signal that the people also have an inherent right of appeal? An obscenity case is not like any other crime which affects only incidentally the community, for in such cases a standard is set which materially affects the entire community. In dismissing the matter without jury trial, is not Judge Holland saying that the community must accept *his* standards—which differs little from what this Court found wrong in the Postmaster censor cases—except that in the Postmaster situation, the pornographer at least had the right to have the matter decided by the highest court to whom he might choose to take his appeal.

Zeitlin, in adopting the hard-core pornography rule in California, holds that Tropic of Cancer by Henry Miller does not constitute hard-core pornography, (pp 904 and 922) basically because it is a serious literary work of social importance. In so holding the court could have considered no evidence but the book itself as there had been no trial. In Fanny Hill, as in Zeitlin, the Massachusetts court erroneously judged the obscenity of the book in the abstract except for some expert testimony and book reviews. The United States Supreme Court reversed, holding that the court should have considered the book in context with its commercial exploitation as prurient matter.

> "and the declaration of obscenity was neither aided or limited by a specific set of circumstances of production, sale, and publicity. All possible uses of the book must therefore be considered . . ." (Fanny Hill, 16 Law Ed. 2d p. 7.)

In the light of this new dimension of "pandering," as it may affect the determination of obscenity *vel non,* this court is of the opinion that in determining the constitutional issue of obscenity on a pre-trial motion it may not only compare[3] the four questioned books with other erotic publications that have been held constitutionally protected by decisions of the Supreme Court of this State and of the United States and other publications that have received wide public acceptance, but should further consider the circumstances of produc-

[3] The trial judge in applying his "deductive analysis" completely ignores a fundamental truth, *i.e.*, that the resolution of the obscenity issue is grounded upon the determinations of a "reasonable person"—a concept which anchors the law to reason and prevents error from reaching geometrical proportions.

tion, sale and publicity which might be conclusive in an otherwise close case.

Generally, the court in its discretion, may receive any kind of relevant evidence in hearing a motion. (34 Cal. Jur. 2d 514.) In criminal cases the court is required, outside the presence of the jury, to receive evidence on motions to suppress illegally obtained confessions and to suppress evidence obtained by illegal search and seizure. (See Zeitlin, 59 Cal. 2d at Page 909 and footnote 12, Page 910.) These likewise are questions of "constitutional fact."

A constitutional fact, says Justice Tobriner, speaking for the court in Zeitlin (p. 910), is a mixed question of law and fact, but that historical facts in obscenity cases which focus upon the material involved are rarely at issue. However, in footnote 13, p. 910, it is indicated that other elements required to make out a violation of 311.2 P.C., such as *scienter,* may depend on historical facts which may be at issue and require some proof.

Thus, the court seems to hold that when a historical fact is at issue the court may take evidence on a pretrial motion to dismiss. It would then follow that if the court rules against the people on conflicting evidence, the ruling is final to the same effect as similar rulings in coerced confession cases. If the court rules for the people, defendant is still entitled to a jury trial on that issue.

Having concluded that the court should consider certain evidence in addition to the four questioned books, evidence has been received, either by stipulation or without objection of any party bearing upon the cus-

tomary limits of candor, applying contemporary standards, in the description of nudity, sex and excretion (311 Penal Code). This evidence includes other erotic books openly available in the market place and in general circulation, together with their volume of sales, and in addition the circulation and volume of sales of other paperback books comparable to the four in issue.[4]

Also received in evidence and considered are other comparable books, offered by both the people and the defendants, which have been judged obscene or not obscene by other trial courts in California and in other states, including some cases in which the jury could not agree on the obscenity issue. Such evidence is relevant in resolving the contemporary standards of candor test. (In re Harris, 1961, 56 Cal. 2d 879.)

The court has further considered all of the evidence submitted to the grand jury not only for its general relevancy, but also for such probative value as the circumstances of production, sale and publicity of the books may possess on the ultimate question of obscenity.

Before evaluating the four questioned books it is helpful to place them in context with the entire national industry in the publication and distribution of

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[4]In obscenity trials (*a fortiori*, a pre-trial motion, as here) the overwhelming weight of authority supports the contrary proposition. *i.e.*, that similar materials appearing in trade are not admissible in evidence on community standards. See CDL Commentaries on the Law of Obscenity, Vol. 1, No. 3, page 3-45 *et seq.* This Court's restrictive rulings in prior restraint cases during the past eight years have made such materials available in vast quantities. See CDL Commentaries on the Law of Obscenity, Vol. 1, No. 2, pages 1-6 *et seq.* This fact coupled with the effect of Justice Harlan's innocent but misleading comment in *Smith v. California*, 361 U.S. 147, 171, has made this a major problem for law enforcement, for, under this theory and in this case, the smut peddler is able to pick himself up by his own bootstraps.

comparable paperback books as it existed prior to the Ginzburg cases. For brevity these books will be thereafter called "nightstand type" books, which is used in the generic sense rather than as the trade name "Nightstand Books" of the 59 books involved in A Quantity of Books v. Kansas (1964) 378 U.S. 205, the only case involving such books so far to reach the United States Supreme Court.[5] The court struck down the Kansas statute authorizing seizure of obscene materials prior to an adversary hearing on their obscenity, but did not rule on the question of obscenity. In a concurring opinion, however, Justice Stewart states he would reverse because the books are not hard-core pornography.[6]

The nightstand type books first appeared on the national scene about 1960[7] after the 1957 Roth-Alberts decision (354 U.S. 476) and after later United States Supreme Court decisions reversing convictions involving highly erotic matter. (See cases cited and discussed in Zeitlin, footnotes 21, 22 and 23.) They are published and nationally distributed openly through established commercial channels to wholesale and retain outlets.

In his well documented and scholarly book,[8] "Sex, Pornography and Justice" (1965) Albert B. Gerber of

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[5]See footnote 25 (*infra*).

[6]Judge Holland fails to mention that Justice Harlan (like Justice Stewart, a "hard-core" advocate, at least, in federal cases) and Justice Clark had views which differed from those of Justice Stewart.

[7]The reason for their appearance in 1960 is commented on in CDL Commentaries on the Law of Obscenity, Vol. 1, No. 2, pages 1-6 *et seq.*

[8]Professor G. Robert Blakey in 41 Notre Dame Lawyer 1055 takes a decidedly different view of defense attorney Al-

(This footnote is continued on the next page)

the Philadelphia Bar generally describes these books (pp. 259 and 286) and quotes 20 pages from one of them which he characterizes as the most "far out" (p. 260). This book, "Lover," is one of the 59 Nightstand Books seized in the Kansas case above cited. On page 286 he states that a score of publishers publish and distribute hundreds of such books designed solely to capitalize on the newly liberated sexual motif.

At the court's request, Franklin D. Laven of the Los Angeles Bar, counsel for defendant Zentner, and Herald P. Fahringer of the Buffalo, New York, Bar, counsel for defendant Sturman, both with extensive experience in the defense of obscenity cases, have submitted to the court in letter form information obtained from their various clients and other contacts in the publication and distribution field which they believe to be a fair and conservative estimate of the volume of national traffic in these books.[9]

In these two letters the names of a total of ten publishers are listed showing the number of "titles" (different books) printed by each publisher per month, the amount printed per title, and the total books printed per month. The ten publishers print from three to ten titles each, or a total of 73 titles per month. Total volume of all of the 73 different titles per month published is 3,120,000.

If these figures are correct, then there is published in the United States a grand total of over 37 million

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bert B. Gerber's 349-page book. Prof. Blakey's 8-page criticism of Gerber's work explodes most of the fallacies upon which Judge Holland based his opinion.

[9]See footnote 4. This is a crystal-clear example of a bootstrap defense.

nightstand type books per year with a retail value of over 25 million dollars.

These figures are not inconsistent with those above referred to in Mr. Gerber's book — and in fact appear more conservative.

Whatever the true volume of traffic in these books may be, from the study the court has made of this subject, one thing is clear and certain—the publication of these books is big business—and involves tens of millions of books and dollars annually.

Nightstand type books carefully follow a uniform format obviously designed and intended to keep just barely within the pale of obscenity statutes and appellate decisions.[10] They are, like most other cheap paperbacks, poorly printed, bound and edited. From about 150 to 200 pages in length, they are priced at fifty cents to one dollar. Titles are selected to effect an erotic impact, usually containing such words as sex, perversion, lesbian, passion, sin, lust, orgy, and the like.

Covers are decorated with full color art depicting semi-clad voluptuous females, and occasionally male figures in erotically suggestive attitudes or embraces, Some cover pictures vividly portray sado-masochistic themes.

Elsewhere on the front cover and sometimes on the back cover is to be found the inevitable "blurb," a short statement in heavy type of about 10 or more words clearly beckoning the shopper to the sexual adventures portrayed in the book.

If the prospective pubescent minded buyer (adult or juvenile) is not yet ready to take the bait he may turn

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[10]We are amazed that the trial judge is so insensitive to the volume of evidence to the contrary, which he thereafter recites so guilelessly in this opinion.

to the first fly leaf where he will find some particularly salacious tid-bit reprinted from the text which could well shoot down in flames any residual sales resistance.

The plots and character delineation of these novels are vestigial, the story line being barely long and strong enough to support the author's dirty linen—a staccato succession of erotic episodes involving both normal and aberrant sex acts of every form and hue. These multi-orgasmic scenes, often with several participants, are liberally laced with lurid descriptions of an endless variety of sexual stimuli—sadism, masochism, flagellation, bondage, torture, electrical devices, sex or fetish symbols, such as lace stockings and panties, high heel shoes, and often high heeled black leather boots, and gloves, girdles, corsets, and other garments of leather or rubber.

Preliminary sex play is described in some detail up to the moment when copulation, whatever its nature, begins. This consists of disrobing, fondling, petting, kissing and tonguing, particularly of the mouth and breasts. The actors are aroused to a high peak of lubricity, subjectively expressed verbally, and by moans, cries, and by sensuous physical contortions. At this point the camera lens is twisted out of focus and the picture becomes blurred. Actual sex acts are not described with any clinical detail or at all and are often merely implied or, at most, related. Neither clinical terms nor any of the usual four letter words are used to describe any sex act or genital organ. Euphemisms such as "he entered her," "she gave him what he wanted," or "they made love" denote copulation. "Temple of love," "mound of Venue," "manhood," and "member" describe genitalia, while "climax" or even less explicit terms

substitute for orgasm. A sexually unsophisticated pre-adolescent, one of today's rarities, would find himself at a complete loss to understand what the actors were doing to each other. All he would learn is that whatever they were doing was lots of fun.

The four books before the court conform to the night-stand format. No further description is needed except for the cover pictures and blurbs:

Lust in Leather. Cover picture shows a blond girl with hypertrophy of breasts and buttocks, wearing a tightly laced corset, lace panties and high leather boots. In her hand is a sword. In a stooping position before her is a male figure masked with the head of a bull.

Blurb:

"Lace, leather boots, lesbians, homosexuals, and love starved wives and husbands . . . all mixed into a devils orgy that rocked one of California's most exclusive country club communities."

Whipped Passions. Cover picture shows two young ladies of like physical endowments. One is dressed in a tight corset-girdle and black lace stockings. Squatting behind her, the other female is adorned only with a tight lace girdle. She holds a whip in her hand.

Blurb:

"Beautiful wicked wantons in high heeled leather boots practiced depraved rites for the entertainment of sex-jaded 'big shots.'"

Perversion Resort. Cover picture shows two mamose, calipygian females clad in brief garments which only slightly veil their charms. One is writhing on a low table to which she is bound. Blood streams from cuts

on her left breast and arm. The other stands over her in a whipping posture, but the whip is not shown.

Blurb:

"Leather loving lesbians sported with each other in a desert hot bed of bizarre tastes."

Club Unique. Cover picture shows female in foregound in high heeled black leather hip boots. A black tight garment covers part of her torso. Behind her another girl nearly nude is manacled in iron cuffs and chained to a wall. She has a bleeding cut on her thigh. In the blurred background are two female and one male figure almost nude.

Blurb:

"In this way out circle of Hollywood deviates, mere lesbianism was old fashioned! Leather quirts were their status symbol, and torture was the order of the day . . . and night."

In Quantity of Books v. Kansas, supra, Justice Harlan in his dissenting opinion, concurred in by Justice Clark, describes the 59 books there involved, including titles, covers, pictures and blurbs. "These inducements," he states (footnote 1), "are a fair indication of the actual contents of the book."

As to contents Justice Harlan in footnote 3 says:

"The essence of these books may be ascertained with great celerity, so replete are they with passages descriptive of sexual activities running the gamut from ordinary intercourse to (many deviate practices.) . . . they are so standardized that (an) estimate concerning the contents of absent books from an examination of the seven books before (the judge) would be almost as sure fire as a similar estimate of—unseen Mickey Mouse comic books based on a perusal of seven issues."

In the course of its study this court has read not only the four "Boudoir Classic" books at issue, but has read or scanned scores of other nightstand type books, published under other "imprints" or trade names such as "All Star Classics," "Brandon House," "Saber," "Intimate Editions," "Private Edition Books," "Satan Press," "Phantom Books," "Vega Books," "After Hours Books," "Sundown Reader," "Leisure Books," and "Pillar Books," as well as other "Boudoir Classics." All of them fit neatly within the dimensions of nightstand type books described herein. None of them, however, employs vulgar expressions or intimate clinical descriptions of sex activities as Justice Harlan seems to imply in his dissent.[11]

It is quite obvious now, however, that on March 21, 1966, when the Supreme Court affirmed Mishkin's conviction and sentence to three years in prison and a fine of $12,000 and that of Ginzburg to five years in prison, the tocsin was sounced loud and clear for the purveyors of pruriency, for since that time nightstand type books with their lurid cover pictures, titles, and blurbs have all but disappeared from the retail book racks. They are still to be found in abundance, though, disguised in acceptably decent and modest attire. Likewise, motion picture theaters have toned down their

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[11]The untrustworthiness of Judge Holland's "comparison" analysis is herein demonstrated. Judge Holland attempts to show that the material which he had before him did not compare with the material which Justice Harlan *described* in *Quantity of Books v. Kansas (but which books Judge Holland had not seen)*. Judge Holland "forgot" that the material which Justice Harlan was describing (Nightstand Book) was the same type of material which he, Judge Holland, was sitting in judgment upon. Judge Holland was too insensitive to note that Justice Harlan was describing the material which he, Judge Holland, had in his own hands.

provocative advertising of erotic films to a more acceptable level.[12]

In Fanny Hill (16 Law Ed.2d 5, 6) the Supreme Court restates its position as follows:

> "We defined obscenity in Roth in the following terms: 'Whether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U.S., at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

In the second paragraph following the above, the court states:

> "Each of the three constitutional criteria is to be applied independently;"

This definition is a close paraphrase of 311 Penal Code except that in the contemporary standards of candor test, prurient interest not only includes sex, but nudity and excretion, and must be morbid or shameful, and must go *substantially* beyond customary limits of candor. The California statute was construed in Zeitlin to proscribe only "hard core" pornography, formerly

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[12]We doubt that the observations which Judge Holland makes here are the proper subject of judicial notice. In fact, an investigation would reveal that the materials have not "disappeared" nor has the advertisements been "toned down".

thought to have been included in the Roth definition but which is now clearly rejected by the United States Supreme Court in Mishkin (16 Law Ed.2d 61), as "more stringent" than the Roth definition. Thus, some material could be found obscene under the now restated Roth definition but not obscene under California law.

In applying the three criteria to the nightstand type books no serious claim could possibly be made that the dominant theme of the material taken as a whole does not appeal to prurient interest. All of these books are carefully composed, titled and illustrated to appeal to a concupiscent audience.[13]

On the social importance test, no one would seriously claim the books possess literary, historical, social or educational value. Most appellate decisions classify these books as "trash" or worse (United States v. Klaw 350 Fed.2d 155, 160). Their entertainment value as is shown by their enormous circulation cannot be denied. Entertainment value alone, especially in the form of such venality as is offered by these books, cannot satisfy the social importance test.[14]

The contemporary standard of candor test is a different matter. Having failed the other two tests, to be branded as obscene under California law the books must *describe* the sex scenes in a shameful or morbid manner which goes *substantially* beyond customary limits of candor.

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[13], [14]In our view, having found that there was no redeeming social importance in the material, Judge Holland's review was concluded. For him to proceed further was a violation of Article I, Section 7 of the California Constitution, which accords to the People of the State of California the right to a jury trial in criminal cases.

The first point of reference in determining this standard is the United States Supreme Court decisions following Roth-Alberts in 1957, holding certain erotic material not obscene. Three of these cases are cited and the material described in Zeitlin (1963) 59 Cal.2d at Page 915. They involve a film describing the seduction of a 16-year-old boy by an older woman, a magazine directed to appeal of male homosexuals called "One, Inc.," and a nudist magazine called "Sunshine and Health." In 1959 the court held not obscene the motion picture version of Lady Chatterly's Lover, far less clinically descriptive than the novel by D. H. Lawrence but still erotic and based on a theme of condoned adultery Kingsley Int'l. Pictures v. Regents, 360 U.S. 684). The unexpurgated novel itself never reached the Supreme Court but was held not obscene by the Federal Circuit Court in Grove Press v. Christenberry (1960) 276 Fed.2d 433, 2d Circuit. In 1962 the Supreme Court held not obscene three illustrated magazines designed to appeal to male homosexuals called MANual, Trim and the Grecian Pictorial. (MANual v. Day, 360 U.S. 478.)[15]

This case and the One, Inc. case, supra, may now be impliedly overruled by Mishkin which holds that the prurient appeal test is satisfied if the material is designed to appeal to a clearly defined deviant sexual group.

In 1964 the Supreme Court held a French motion picture, called "Les Amants" (The Lovers) not obscene. A bored housewife dallies with various lovers and fi-

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15, 16, 17, 18We do not agree with the trial judge in his evaluation of the effect of these no-majority decisions. See the remarks of Professor Blakey in 41 Notre Dame Lawyer 1055, at page 1058.

nally falls in love with a young archeologist. The last scene depicts the lovers in bed obviously engaging in intercourse. This case holds that community standards of obscenity means the community standards of the entire nation as a whole.[16] It also holds that every court, including trial courts, must exercise its independent judgment on questions of constitutional fact in obscenity cases when raised. (Jacobellis v. Ohio, 378 U.S. 184.)

Also in 1964 the court held Henry Miller's "Tropic of Cancer" not obscene,[17] the same conclusion of the California Supreme Court in Zeitlin in 1963. (Grove Press v. Gerstein, 378 U.S. 577.)

The last Supreme Court case in 1964 was Tralins v. Gerstein, 378 U.S. 576, holding constitutionally protected[18] the book "Pleasure Was My Business," the story of the proprietress of a Miami brothel which describes in considerable detail the bizarre deviant practices of some of her customers of high social and community standing. Included are scenes involving sadism, masochism, flagellation, voyeurism, and exhibitionism.

In 1966 the court reversed the New York Court of Appeals which had held Fanny Hill obscene, but applying the new pandering rule, held it might be either fish or foul, depending upon whether its publisher had exploited it solely for its prurient interest.

After the convictions of Roth and Alberts were affirmed in 1957 the Anthony Comstocks took heart. But they failed to read between the lines. The court did not pass on the question of obscenity in those cases but formulated a new constitutional test for obscenity. The publishing industry, aware of the insatiable appe-

tite of the American public for erotica, correctly interpreted[19] Roth-Alberts as a limited license to exploit this vast untapped resource.

Fanny Hill, written over 200 years ago, was resurrected and published along with Chatterly's Lover and Tropic of Cancer, both written a generation ago. They were all sold in hard cover and paperback by the millions.

These books and the other erotic material withstood scrutiny of the Supreme Court because they successfully passed the pruriency-dominate theme test or the social importance test or both. These books describe sex scenes in intimate detail which include many deviant episodes. Four letter words and common vulgar expressions are strewn throughout most of them.

A great number of other books, some old and some new, which no publisher in his right mind[20] would have dreamed of openly publishing a few years ago are now published and openly sold in the millions of copies and are to be found listed in most public and university libraries. To mention but a few:

> My Life and Loves, by Frank Harris, the excellent autobiography of a distinguished author and critic. The first of the five volumes of this work written in the 1920's, intimately describes the numerous sexual adventures of his adolescence and early manhood.

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[19]We think this to be an "incorrect" evaluation of the majority opinion in Roth-Alberts, particularly in the light of this Court's majority opinion in Ginzburg. One would infer from the judge's statement that the people had really lost the Roth-Alberts case.

[20]With this one observation of the trial judge we are in complete agreement.

Candy, by Maxwell Kenton, regarded as an erotic spoof, a surrealistic Alice in Wonderland type of story in which a naive young girl becomes innocently involved in one sexual misadventure after another. Copies reported sold are over four million. In a letter dated June 23, 1965, addressed to the Citizens for Decent Literature in St. Louis, the Attorney General of the United States states his reasons for declining to prosecute under Federal Statutes.

Sexus, by Henry Miller (Grove Press), 634 pages, a novel similar in erotic content to his Tropic of Cancer, Tropic of Capricorn, Plexus and Nexus, describes at least 34 sexual scenes, one violent, all employing expressions of extreme vulgarity. Over a million copies have been sold. In a lengthy legal opinion of the Attorney General of the State of Utah, requested by the Law Observance and Enforcement Committee of the Church of Christ and Latter Day Saints, dated October, 1965, this book was held not obscene, the Attorney General refusing to take any action.

Nearly four million copies of Fanny Hill have been distributed.

Publication figures for other books of high but variable erotic content are:

Tropic of Cancer, 3,250,000
Tropic of Capricorn, 1,000,000
Last Exit to Brooklyn, 1,050,000

These books do not by any means exhaust the current field of scores of other controversial books of comparable erotic content possessing literary quality or so-

cial importance or both, all openly available in the market and in public and university libraries.

One last and final work deserves a special emphasis. This is a book containing an idiomatic translation from French to English of a few of the better known writings of the Marquis de Sade (1740-1814) published by Grove Press in hard cover in 1965 ($15.00) and in paper back in 1966 ($1.75, 752 pages).

This powerful writer, talented scholar, and rebel against the corruption of his times, left with his writings a deep impact on the world of literature, philosophy, history and psychiatry. His authentic portrayals of the sexually psychotic monsters in his writings are morbid and shocking almost beyond belief to anyone unacquainted with Kraft-Ebbing's Psychopathica Sexualis.

In this book, probably the first unbowlderized translation of any Sade's works published in this country are three novels, Philosophy of the Bedroom, Engenie de Franval, and Justine.

The first of these novels describes in minute sexual and scatological detail and in vilest language a succession of wild orgiastic scenes with both male and female actors who perform in pairs and groups every kind of copulation save normal intercourse. In the final scene the sex crazed group perform an unspeakable act of obscene torture upon an elderly woman.

Justine, who plays the title role in the third and best known novel is the prototype of Little Orphan Annie. She falls innocently into and escapes from the clutches of vicious sadists who find sexual relief only in a wide variety of horrifying tortures and murders.

This book now enjoys wide circulation and is available in book stores and campus libraries. To the per-

sonal knowledge of this court all books mentioned herein (exclusive of the nightstands) are listed in the library catalogues at the University of California at Los Angeles.

If all of these books, excluding de Sade, fairly represent contemporary standards, then by the many millions of copies publicly sold they have clearly established a customary limit of candor in the literary tastes of the American public which tolerates a very high degree of stark, raw realism in the description of sexual matters.[21]

If de Sade's book by wide public acceptance finds a secure place in our literature, and perhaps other similar imported works awaiting in the wings, then any residual limits of candor will have disappeared into outer space.

Counsel have submitted evidence and records of other obscenity cases in California disposed of at the trial level, all involving nightstand type books which is summarized as follows:[22]

1. Ballantyne v. Hogue, Superior Court, Tulare County No. 59666, a declaratory relief action involving three books, Orgy House, Passion Puppet, and The Lust Circuit. On November 24, 1964, Judge Wingrove held the books not obscene.

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[21]See footnote 4.

[22]Judge Holland is not the only California judge who has prevented pornographers from being brought to trial under the California statute. As mentioned in this opinion, California Judges Sprankle, Klein, Landis, Selber and Mast have also dismissed obscenity prosecutions *before trial*. We are familiar with the subject matter involved in those cases and can say in good conscience that there was no difference in the quality of the material ruled upon by these judges (where the issue was "probable cause") and that found to be obscene in the jury cases noted.

2. People v. Luros, Superior Court, Los Angeles County No. 295 183, a criminal conspiracy action, as in the present case, involving six books, Two Women in Love, Lesbian Captive, Lesbians in White, The Girls at Wendy's, Three Way Apartment and Honey Lips. On June 14, 1965, Judge Sprankle held the books not obscene and dismissed the action.

3. People v. Mills, Municipal Court, Los Angeles Judicial District No. 256 429, a misdemeanor prosecution involving one book entitled Borrow Her Tonight. On July 22, 1966, Judge Klein held the book not obscene and dismissed the action.

4. People v. Misuraca, Municipal Court, Los Cerritos Judicial District No. M 25081, a misdemeanor prosecution involving four books, The Naked Archer, Black is for Bliss, Sexpionage, and Fetish Farm. On August 1, 1966, Judge Landis dismissed the counts involving the first three books, holding they were not obscene. On the fourth count involving Fetish Farm, the jury disagreed. The case is now set for retrial.

5. People v. Schnepf, Superior Court, Los Angeles County No. 289 205, a criminal conspiracy action involving the following nine books, Wild Women of Wolf River, Girls in High Spike Heels, Route 69, Fanny Hill, Beds of Canyon Grove, Sin Island, Women of Beaver Mountain, Surburban Sexpots, and the Love Teacher. On February 23, 1965, Judge Selber held the first four books not obscene and ordered them stricken from the pleadings. On March 19, 1965, the jury returned a verdict of not guilty with respect to the other five books, but inexplicably, in a special verdict found the books to be obscene.

6. - People v. Haddad, Superior Court, Los Angeles County No. 273, 608, a criminal conspiracy action involving four books entitled, Sex Life of a Cop, Devil's Advocate (not to be confused with two excellent novels of the same name by Taylor Caldwell and Morris L. West), the Head Humpers, and Down She Goes. The defendants were found guilty after a jury trial, which was affirmed on appeal. The question of obscenity was not raised on appeal, but nevertheless was discussed in the unreported decision of the District Court of Appeal as to only one book, Devil's Advocate. The Court held that this book, without mentioning the others, was obscene. The Court has read this noisome book. It is the only unqualified specimen of hard core pornography that this Court has yet read. The defendants' operation was little more than bootleg smut peddling. The decision on the other books is not definitive.

7. People v. Mishey, Municipal Court, Santa Ana Judicial District, a misdemeanor prosecution involving two books called Three-And-A-Half Women and Madame Butch. On September 28, 1966, Judge Paul Mast dismissed the case holding the books were not obscene.

8. People v. Moscovitz, Municipal Court, Los Angeles Judicial District, a misdemeanor prosecution involving a book entitled Lust by Friends and Neighbors. Defendant was convicted after a jury trial, September 27, 1966.

9. United States v. Aday, United States District Court, Southern District of California, Northern Division, No. 3545ND, criminal, a four-count indictment involving the following 12 books, The Black Night, Rene, Stairways to Sin, Dark Quafters, The Rambling Maids, Tainted Wife, Violent Surrender, The Strange

Three, Karla, Turbulent Daughters and Taxi Dancers. Apparently all but three of these books were stricken as not obscene. In November, 1958, the jury returned a not guilty verdict as to the book, The Rambling Maids, but disagreed as to the other two, having voted nine to three for acquittal. Thereafter, February 6, 1959, Judge Yankwich dismissed the indictment.

It is interesting to note that in the Luros case following dismissal of the California case by Judge Sprankle, Luros and others were indicted under Federal obscenity statutes in the United States District Court, Northern District of Iowa, Western Division, No. 65-CR-3007-W, the 26-count indictment involving a number of books and magazines, four of which were the same books involved in the California prosecution. Some of the counts were dismissed but on the other counts the jury returned guilty verdicts.[28] Thereafter, on January 14 1966, defendants renewed and submitted their motion to dismiss on constitutional grounds, which motion to this day remains undecided.

In 1960, the above mentioned Aday was the defendant in another conspiracy prosecution involving a number of similar books, among which was one called Sex Life of A Cop, also known as 10:04 Sgt. Thorne, the same book as in the above Haddad case. This case reached the Supreme Court of California on a search and seizure question (55 Cal.2d 789). This case has never been brought to trial. Thereafter, in 1964 or 1965, Aday was prosecuted under Federal obscenity statutes in the United States District Court for the

[28]This result is not unusual. Where the matter is tried to a jury, the result is uniformly the same: Verdict guilty — subject matter obscene. See Bromberg, Five Tests For Obscenity, 41 Chicago Bar Record 416, 418 (1960); 40 Notre Dame Lawyer 1, 10 (1964).

Western District of Michigan, Southern Division, Criminal No. 66150A, in a 19-count indictment involving the following eight books: Witch Finder, The Black Night, Decisive Years, Sex Life of a Cop, Desperate Moments, Love Princess, I Am A Lesbian, and Never Enough. The jury was unable to agree that any of these books was obscene except Sex Life of a Cop on which defendant was found guilty on five counts for selling the single book, and received maximum penalty on each count of five years imprisonment and $5,000 fine, cumulated to a total of a $25,000 fine and 25 years imprisonment, five years longer than the sentence served by the last two Nazi war criminals to be released from Spandau Prison for the crime of genocide, the most infamous of all. The conviction was affirmed but returned to the trial court with the suggestion to reduce the harsh penalty. (United States v. West Coast News Company, March, 1966, 357 Fed.2d 855.) Aday was then resentenced to ten years imprisonment. A writ of certiorari on this case is now pending before the United States Supreme Court. This Court has read Sex Life of a Cop, a ribald parody on the moral hypocrisy of some members of the police department and certain public officials in a small town, including the chief of police, the mayor and a judge. There are related a long series of sexual episodes which are described with no more detail than the tamest of the nightstand type books, and completely lacks violence or deviant practices. In this Court's opinion, this book could not possibly be held to be obscene on the limits of candor test under California law[24] and appears to be com-

[24]This is another example of a trial judge who refuses to follow a previous decision of his own Supreme Court. See *Aday*

(This footnote is continued on the next page)

parable to a book called "The Sex Addicts" recently described and exculpated of obscenity by the Supreme Court of Illinois. (People v. Kimmel, decided September, 1966.)

10. United States v. Hamling, United States District Court for the Southern District of Texas, Houston Division criminal No. 65-H-172, a 26-count indictment was filed based on Federal obscenity statutes involving the following seven books: Orgy Club, Sin Summer, Shame Hunger, Temple of Shame, Virgins, Inc., Passion Carousel, and Swap Sect. Following a long trial, the jury was then unable to agree after nine days of deliberation and a mistrial was declared. At the present time a motion is pending to dismiss on constitutional grounds. At the conclusion of the trial, Judge Ingraham is reported in an editorial in the Houston-Chronicle, September 5, 1966, to have advised the prosecutors to "take a long, hard look" at the evidence before proceeding with a new trial. This trial lasted six weeks and

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v. Superior Court of Alameda County, 55 Adv. Cal. 796, 16 Cal. Rptr. 415 (May 11, 1961) and *California v. Aday et al.*, 226 Adv. Cal. App. 634, 38 Cal. Rptr. 199 (April 21, 1964), holding there was probable cause to believe "Sex Life of a Cop" obscene. Judge J. Irwin Shapiro did the same thing in *N. Y. v. Birch*, 40 Misc. 2d 626, 243 N.Y.S.2d 525 (1963), wherein Judge Shapiro held "College for Sinners" constitutionally protected, a book which had already been affirmed as outside the protection of the Constitution by the Appellate Division of the N.Y. Supreme Court, a decision which the New York Court of Appeals and the U.S. Supreme Court refused to review. CDL Commentaries on the Law of Obscenity, Vol. 1, No. 2, pages 1-9, 1-10, *N.Y. v. Fried*, 18 App.Div.2d 996, 238 N.Y.S.2d 742 (1963), appeal dismissed and certiorari denied 378 U.S. 578 (1964). We are convinced that had Judge Holland's decision been appealed, it would have been reversed by the California Supreme Court, as was Judge Shapiro's in the New York jurisdiction, *N. Y. v. Birch*, 269 N.Y.S.2d 752 (May 2, 1966).

cost the government an estimated $100,000 according to the editorial, which states in the final paragraph:

> "When society cannot arrive at a substantial agreement on obscenity—and we think the jury deadlock accurately reflects the broader view—then it is better to take no action at all."

From these few samplings of trial court decisions and jury verdicts it is at once strikingly obvious that of all the nightstand type books involved only a very few have been found obscene.[25] In the vast majority the books were found not obscene by the court or jury—or the jury could not agree.

This is then a report of a rather extensive survey made by the court with the help and cooperation of all counsel into the publicly accepted field of erotic literature. It was made, in the words of Judge Learned Hand in United States v. Kennerley, 209 Fed. 119 (1913) in an effort to determine "the average conscience of the time," and

> "the present critical point in the compromise between candor and shame at which the community may have arrived here and now."

From the array of evidence before the court, that "present critical point" is fixed and determined beyond a peradventure of a doubt "here and now" far outside of the orbit of the most salacious of the tepid and tasteless trash found in the nightstand type books.[26]

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[25]The trial judge was woefully uninformed. See CDL Commentaries on the Law of Obscenity, Vol. 1, No. 1, pages 17-23, CDL Commentaries, Vol. 1, No. 2, pages 3-1 through 3-12, and CDL Commentaries, Vol. 1, No. 3, pages 5-1 through 5-16, which demonstrates the complete unreliability of the deductive type of reasoning employed by the trial judge. See footnote 3.

[26]See footnotes 3 and 4. The trial judge's logic escapes us. He forgets the governmental reason for proscribing obscenity.

(This footnote is continued on the next page)

In the Ginzburg cases the Supreme Court now seems to have adopted a position long ago advocated by the Chief Justice in Roth-Alberts and reemphasized in his dissent in Jacobellis, 378 U.S. 203. This has been called the "sufficient evidence test" which seems to mean that if the material is commercially exploited for the sake of its prurient appeal to the exclusion of all other values *and there remains some doubt* that the material meets all three requirements of the constitutional definition of obscenity, then the trial court may accept the purveyor's evaluation at face value and the Supreme Court will not then reweigh the evidence. (Fanny Hill, 16 Law Ed.2d p. 7.) The same thought is again expressed in Ginzburg on Page 38 (16 Law Ed.2d) but on Page 40 the court seems further to define and limit the pandering rule by the following passage:

> "We perceive no threat to the First Amendment guarantees in thus holding that in *close cases* evidence of pandering *may* be probative with respect to the nature of the material." (Emphasis added.)

Thus it is clear that pandering alone will not sustain a conviction. There must be substantial evidence on all three aspects of the test before evidence of pandering can be added to swing the balance.

If he is correct, then it would be possible to show, from statistical analysis as to the number of persons who fornicate and the high position of some of those, that houses of prostitution must be acceptable to contemporary community standards. Are communities to be penalized when its law enforcement efforts in this area have in the past been strangulated by the penalizing nature of this Court's recent decisions, aimed at developing new rules in prior restraint cases—decisions which have stimulated the proliferation of such materials? We cannot believe that the law will tolerate this judge's valuation which would make the constitutional standard always a sinking one.

The 50 Mishkin books appear similar to the four in question with respect to titles, cover pictures, blurbs, and general content but the extent of detailed clinical description of sexual scenes is not clear. Only one of the Mishkin books has been submitted to this court, title "Swish Bottom," the contents of which are relatively bland and probably not representative of the other 49.[27] This book is price marketed in bold type at five dollars.

Mishkin's instructions to his authors (Page 62, 16 Law Ed.2d) are similar to letters of instructions from publisher to author here except for this saving grace:[28]

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[27]How can a judge make a differentiation as to material he has never seen? When he does, is prejudice indicated?

[28]We see neither distinction nor saving grace. cf. Mishkin's Instructions to his authors appearing at p. 11, fn. 7, 8 in CDL Brief Amicus Curiae in Mishkin Case. We would have thought the trial judge to have had his tongue in cheek had he printed the entire letter. It was:

> "We are currently starting a brand-new line of pocket-books, and we would like to see ideas and submissions from you.
>
> "The pocketbook picture has been changing by the month, as you know, and we need tough, strong, hard-hitting sex-action-filled books, geared to the demands of today's and tomorrow's highly competitive market—rather than to the standards of even a few months ago.
>
> "What we basically seek is off-beat sex, with emphasis on deviations such as lesbianism, sadism, masochism, fetichism, seance-a-trois, voyeurism, etc. The more off-beat the better. There is a demand for books about lesbians. (Male homo-sexuality, however, we tend to steer away from—in fic-tion.)
>
> "Plot is secondary. We do not want complicated plots, naive sex adventure stories, detective stories 'spiced' with sex—nor pages of rambling, pointless dialogue. What we need is detailed, vivid sex action, scenes every few pages, the more the better. Naturally the sex must be done in good taste by today's standards; we don't want four-letter words or *too* clinical descriptions. But within these limits it must be as strong—*and* as off-beat as possible.
>
> "Manuscripts for this new line should run 38,000—39,000 words. Our limit is 40,000. Not more."

(This footnote is continued on the next page)

"Naturally the sex must be done in good taste by today's standards; we don't want four-letter words or *too* clinical descriptions."

Obviously this publisher was attempting to comply with the obscenity laws as he understood them.

Mishkin did not operate on a national basis through regular commercial outlets. His operation was closer to that of the under-the-counter smut peddler,[29] as he sold only his own books through his own retail store except for an occasional sale to other outlets, all at contraband prices.

Finally, Mishkin holds (Page 62, 16 Law Ed.2d) that the prurient appeal test is satisfied if the material taken as a whole appeals to the prurient interest in sex members of a clearly defined deviant sexual group, referring in footnote eight to the American Handbook of Psychiatry.

Another of Zentner's letter to authors read:

"What we basically seek is off-beat sex, with emphasis on deviations. Some possible themes to write by: foot wear lined and rubber clothing, ultra high heels, whipping, gagging, female dominance, gloves, sex rituals, transvestia, sadism, masochism, homisexuality, phallic symbols, buttocks, inter-racial affairs (oriental, african, indian), boots and shoes, corsets and tight lacing, spanking, tying, girls fighting, wet clothing, masks, wife swapping, lesbianism, exotic lingerie, group orgies, voyeurism, aphrodisiacs, fettishes.

"Plot is secondary. We do not want complicated plots, naive sex adventure stories 'spiced' with sex—nor pages of rambling, pointless dialogue. I need more descriptions and more characters per book. Naturally, I expect the descriptions of these various things to be in good taste. The mere fact that some of these themes are used will sell our books."

[29]We do not read the Mishkin record as showing his business to be an under-the-counter operations which can be distinguished from Zentner's operations. Zentner's operations and criminal record place him in the same class as Mishkin. See CDL Commentaries on the Law of Obscenity, Vol. 1, No. 3, at pages 3-3 and 3-9.

This authoritative work names and describes ten major sexual perversions: overt homosexuality, pedophilia, fetishism, transvestimism, exhibitionism, voyeurism, sadomasochism, zoophilia, coprophilia, and necrophlia. "In defining perversion, however," says the author (Page 589) a distinction must be made between perverse acts and perversion as a psychopathological condition. A person whose primary mode of gratification is one of normal coitus might, nevertheless, derive some additional gratifications from acts that in themselves would be classified as perverse. As long as genital gratification in coitus is dominant, such a person would not be defined as a pervert."

While numerous perverse acts are related, few characters are to be found who are confirmed perverts, and they are usually lesbians. There are no male homosexuals. The acts are almost always foreplay to normal coitus Normal sex plays the predominant role. Sexual deviance is not advocated or condoned as a way of life. None of the books can be said to appeal predominantly as a whole to any single deviant group or combinations of groups such as the material designed for male homosexuals in the One, Inc. and MANual cases, supra.

These deviant incidents appeal to the average man's insatiable curiosity in sex in all its forms as may be inferred from the enormous sales volume in nightstand type books.

Moreover, Mishkin was convicted under the state obscenity statutes of New York which define obscenity in far broader terms than Section 311, Penal Code (Footnote 1, Page 58, 16 Law Ed.2d).

It is the conclusion of this court that the four books in question fall far short of satisfying the customary

limits of candor test applying contemporary standards. To be obscene the material must go substantially beyond these limits. Although the books were commercially exploited solely to appeal to prurient interest, that fact cannot overcome the fatal deficiency of this essential element. The books are, therefore, not obscene as a matter of law.[30]

In the words of Justice Harlan—society cannot condemn that which it tolerates.

The court wishes to thank all counsel for their assistance and friendly cooperation with the court and with each other in the presentation of this case, all in the highest tradition of the profession.

Thanks are also extended to Mr. Stanley Fleishman of the Hollywood Bar, an advocate preeminent in this confusing field, for furnishing the court information on the present status of several cases mentioned herein in which he is counsel, and for furnishing to the court some of the books discussed.

It is ordered that the motion of the defendants to dismiss the indictment on constitutional grounds be, and the same is, granted.

Dated: November 4, 1966.

Kenneth Holland
Judge of the Superior Court

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[30]We believe that a casual reading of this opinion demonstrates more succinctly than argument the great havoc that would result were the majority of this Court to abandon the basic principle of Roth (i.e., that the business of appealing to the prurient interest can be proscribed) in favor of the three criteria test employed in the California jurisdiction. We are understating our evaluation when we say that the dismissal herein was a complete miscarriage of justice.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ADAY ET AL. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 149. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the Sixth Circuit is reversed. *Redrup* v. *New York*, 386 U. S. —, decided May 8, 1967.

THE CHIEF JUSTICE and MR. JUSTICE BRENNAN would grant the petition, vacate the judgment, and remand in light of *Memoirs* v. *Massachusetts*, 383 U. S. 413.

MR. JUSTICE CLARK would grant the petition and affirm.

MR. JUSTICE HARLAN concurs in the reversal on the basis of the reasoning set forth in his opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478.